88-1022

No._____

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1988

HENRICO COUNTY PUBLIC SCHOOLS, MALCOLM M. CHRISTIAN, WILLIAM C. BOSHER, JR., MORTON BRADMAN, JOANN MARCHANT, PATRICIA MARTIN, GWENDOLYN WHITING, DOROTHY SUGERMAN, and DONALD MAYFIELD,

Defendants/Petitioners,

v.

JONATHAN SPIELBERG, a minor by his parents, Howard and Susan Spielberg, as his next friend; HOWARD SPIELBERG; and SUSAN SPIELBERG,

Plaintiffs/Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In September, 1985, pursuant to 34 C.F.R. §300.504(a), Henrico County Public Schools (Henrico) notified the parents of Jonathan Spielberg that it was proposing a change in Jonathan's placement. The notice specifically stated that the decision on placement would be made after consideration of revisions to Jonathan's individualized education program (IEP). Jonathan's IEP was subsequently revised in two meetings with Jonathan's parents and their attorney, and the IEP Committee then agreed that Jonathan could be moved from a Pennsylvania institution to a "state of the art" Henrico public day school.

Condemning what it called a lack of parental involvement in the placement decision, the Fourth Circuit ruled that Henrico officials denied Jonathan a free appropriate public education (FAPE) under

the Education of All Handicapped Children Act (EAHCA) "when they resolved to educate Jonathan Spielberg at Randolph, and then developed an IEP to carry out their decision." App. 14.

Upon finding the violation, the Fourth Circuit ordered continuation of the Pennsylvania placement. However, it did not consider the extensive parental involvement throughout the decisional process or the final state administrative decision which found the Pennsylvania program overly restrictive for Jonathan.

The questions presented are two:

I. **Is the proper standard of review for EAHCA procedural compliance Rowley's "adequate compliance" standard or the Fourth Circuit's "zero tolerance" test?**

II. **When the Fourth Circuit relied upon what it believed school officials "resolved" before the IEP meeting, did its use of a "mental processes" test misapply the procedural safeguards of EAHCA, as interpreted in Rowley?**

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October Term, 1988

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HENRICO COUNTY PUBLIC SCHOOLS, MALCOLM M. CHRISTIAN, WILLIAM C. BOSHER, JR., MORTON BRADMAN, JOANN MARCHANT, PATRICIA MARTIN, GWENDOLYN WHITING, DOROTHY SUGARMAN, and DONALD MAYFIELD,

Defendants/Petitioners,

v.

JONATHAN SPIELBERG, a minor by his parents, Howard and Susan Spielberg, as his next friend; HOWARD SPIELBERG, and SUSAN SPIELBERG,

Plaintiffs/Respondents.

Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

OPINIONS BELOW

The Court of Appeals opinion is reported at 853 F.2d 256 (4th Cir. 1988). It is reproduced at App. pp. 1-14. The

order denying Henrico's petition for rehearing is reproduced at App. pp. 15-16. The two district court opinions are unreported. Case No. 86-0304-R (E.D. Va. January 23, 1987 and October 8, 1987). They are reproduced at App. pp. 17-59. The state administrative decisions are unreported and were issued on March 5, 1986 and April 26, 1986. They are reproduced at App. pp. 60-155.

JURISDICTION

The Court of Appeals decision was entered on August 5, 1988. Rehearing was denied on September 22, 1988. This Petition is timely filed. Jurisdiction is invoked under 28 U.S.C. §2101(c).

REGULATORY PROVISIONS INVOLVED

Title 20 of the United States Code, in relevant part, provides:

§1415(b)(1) The procedures required by this section shall include, but shall not be limited to:

. . .

(c) written prior notice to the parents or guardian of the child whenever such agency or unit -

(i) proposes to initiate or change, or

(ii) refuses to initiate or change, the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

. . .

(e)(2) ... In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

Title 34 of the Code of Federal Regulations, in relevant part, provides:

§ 300.104 (a) Preplacement evaluation. A recipient that operates a public elementary or secondary education program shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of

handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in a regular or special education program and any subsequent significant change in placement.

§ 300.342 (b) An individualized education program must:
(1) Be in effect before special education and related services are provided to a child; and
(2) Be implemented as soon as possible following the meetings under Reg. 300.343.

§ 300.344 (b) Evaluation personnel. For a handicapped child who has been evaluated for the first time, the public agency shall insure:

(1) That a member of the evaluation team participates in the meeting; or

(2) That the representative of the public agency, the child's teacher, or some other person is present at the meeting, who is knowledgeable about the evaluation procedures used with the child and is familiar with the results of the evaluation.

§ 300.347 (a) (1) Before a public agency places a handicapped child in, or refers a child to, a private school or facility,

the agency shall initiate and conduct a meeting to develop an individualized education program for the child in accordance with Reg. 300.343.

(2) The agency shall insure that a representative of the private school facility attends the meeting....

§ 300.504 (a) Notice. Written notice which meets the requirements under Reg. 300.505 must be given to the parents of a handicapped child a reasonable time before the public agency:

(1) Proposes to initiate or change the identification, evaluation or educational placement of the child or the provision of a free appropriate public education to the child.

§ 300.505 (a) The notice under Reg. 300.504 must include: (1) A full explanation of all the procedural safeguards available to the parents under Subpart E; (2) A description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take the action, and a description of any options the agency considered and the reasons why those options were rejected; (3) A description of each evaluation procedure, test, record, or report the agency uses as a basis for the

proposal or refusal; and (4) A description of any other factors which are relevant to the agency's proposal or refusal.

§ 300.531 Preplacement evaluation.

Before any action is taken with respect to the initial placement of a handicapped child in a special educational program, a full and individual evaluation of the child's educational needs must be conducted in accordance with the requirements of Reg. 300.532.

§300.533 Placement procedures.

(a) In interpreting evaluation data and in making placement decisions, each public agency shall:

(1) Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior;

(2) Insure that information obtained from all of these sources is documented and carefully considered;

(3) Insure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the

evaluation data, and the placement options; and

(4) Insure that the placement decision is made in conformity with the least restrictive environment rules in Regs. 300.550-300.554.

(b) If a determination is made that a child is handicapped and needs special education and related services, an individualized education program must be developed for the child in accordance with Regs. 300.340-300.349 of Subpart C.

Comment. Paragraph (a)(1) includes a list of examples of sources that may be used by a public agency in making placement decisions. The agency would not have to use all the sources in every instance. The point of the requirement is to insure that more than one source is used in interpreting evaluation data in making placement decisions....

§ 300.552 Each public agency shall insure that:

(a) Each handicapped child's educational placement:

. . .

(2) Is based on his or her individualized education program....

In addition, Appendix C to 34 C.F.R., Part 300, in relevant part, provides:

> **8. Must the agency hold a separate meeting to determine a child's eligibility for special education and related services, or can this step be combined with the IEP meeting?**
>
> .... The decisions regarding (1) whether the team members actually meet together and (2) whether such meetings are separate from the IEP meeting, are matters that are left to the discretion of State or local agencies....
>
> NOTE: When separate meetings are conducted, placement decisions would be made at the IEP meeting. However, placement options could be discussed at the eligibility meeting.
>
> **23. Must related services personnel attend IEP meetings?**
>
> No. It is not required that they attend. However, if a handicapped child has an identified need for related services, it would be appropriate for the related services personnel to attend the meeting or otherwise be involved in developing the IEP. For example, when the child's evaluation indicates the need for a specific related service (e.g., physical therapy, occupational therapy, or

counseling), the agency should ensure that a qualified provider of that service either (1) attends the IEP meeting, or (2) provides a written recommendation concerning the nature, frequency, and amount of service to be provided to the child.

32. **Must parents be informed at the IEP meeting of their right to appeal?**

If the agency has already informed the parents of their right to appeal, as it is required to do under the prior notice provisions of the regulations (§§300.504-300.505), it would not be necessary for the agency to do so again at the IEP meeting....

42. **When must IEP objectives be written - before placement or after placement?**

IEP objectives must be written before placement. Once a handicapped child is placed in a special education program, the teacher might develop lesson plans or more detailed objectives based on the IEP; however, such plans and objectives are not required to be a part of the IEP itself.

43. **Can short term instructional objectives be changed without initiating another IEP meeting?**

No. Section 300.343(a) provides that the agency "is responsible for initiating and

conducting meetings for the purpose of developing, reviewing, and revising a handicapped child's individualized education program" (emphasis added). Since a change in short term instructional objectives constitutes a revision of the child's IEP, the agency must (1) notify the parents of the proposed change (see §300.504(a)(1)), and (2) initiate an IEP meeting.

55. Is it permissible for an agency to have the IEP completed when the IEP meeting begins?

No. It is not permissible for an agency to present a completed IEP to parents for their approval before there has been a full discussion with the parents of (1) the child's need for special education and related services, and (2) what services the agency will provide to the child.... It would be appropriate for agency staff to come prepared with evaluation findings, statements of present levels of educational performance, and a recommendation regarding annual goals, short term instructional objectives, and the kind of special education and related services to be provided. However, the agency must make it clear to the parents at the outset of the meeting that the services proposed by the agency are only recommendations for review and discussion with the parents. The legislative history of Pub. L. 94-142 makes it clear that parents

must be given the opportunity to be active participants in all major decisions affecting the education of their handicapped children....

59. If placement decisions are made at the time the IEP is developed, how can a private school representative attend the meeting?

Generally, a child who requires placement in either a public or private residential school has already been receiving special education, and the parents and school personnel have often jointly been involved over a prolonged period of time in attempting to find the most appropriate placement for the child. At some point in this process (e.g., at a meeting where the child's current IEP is being reviewed), the possibility of residential school placement might be proposed--by either the parents or school personnel. If both agree, then the matter would be explored with the residential school. A subsequent meeting would then be conducted to finalize the IEP. At this meeting, the public agency must ensure that a representative of the residential school either (1) attends the meeting or (2) participates through individual or conference telephone calls, or by other means.

Section II (B)(1)(g) of the Regulations Governing Special Education Programs for Handicapped Children and Youth in Virginia provides, in relevant part:

> Each LEA shall insure that an evaluation of the child, based on required procedures, is conducted:
>
> ...
>
> (3) Anytime a significant change in placement is being considered.

Page 18 of the Virginia Department of Education's interpretation of state special education regulations, The Process for Special Education Determination in Virginia (Clarification of Issues) (Screening, Assessment/ Eligibility, IEP Development/ Implementation), provides, in relevant part, as follows:

> **•Under what circumstances can existing date be considered "current"?**

> Generally, assessment data less than 6 months old may be considered current and thus presented to the committee(s) for review and consideration in decision making. Information older than 6 months must be updated by an appropriate professional.

STATEMENT OF THE CASE

This special education case involves the Fourth Circuit's reversal of two state administrative decisions and a federal district court decision in favor of Henrico County Public Schools on the issue of procedural compliance with the Education of All Handicapped Children Act.

Jonathan Spielberg is a brain-damaged, severely retarded 19 year old. Diagnosed as profoundly retarded at age 2, Jonathan lived at home with his parents until he was 5 years old.

Since Henrico did not have an educational program which served severely

retarded children at the time, Jonathan was placed in the Melmark School ("Melmark") in Pennsylvania in October, 1977. The School Board has paid the full cost of the Melmark placement since that time.

In March, 1985, nine months after Jonathan's triennial reevaluation, Henrico notified the Spielbergs in writing that it would reevaluate Jonathan and the appropriateness of his placement. A School Board team conducted an on-site evaluation in August, 1985 and expressed its opinion that Jonathan could be appropriately served in his home community. The written evaluation reports were shared with the parents as soon as they were completed, and on two occasions Henrico agreed to pay the costs of outside evaluations if the Spielbergs wished to obtain and submit them.

On the basis of its evaluations, Henrico gave written notice that it was proposing a change in placement following revision of Jonathan's IEP in October, 1985. Meetings to develop a revised IEP and to consider a change in placement were held in October and November, 1985, and the parents and their attorney were present and participated. At the end of the meeting, the IEP Committee members agreed that Jonathan could be served in the day program of Virginia Randolph in Henrico.

Neither the School Board nor any school administrators ever adopted any "resolution" regarding Jonathan's placement during this process even though the Fourth Circuit used the word "resolved" in its procedural violation ruling. App. 14. Nor was any document created by Henrico before the IEP

meetings which indicated that Virginia Randolph would be, as opposed to "could be," Jonathan's placement.

The Spielbergs and Henrico were unable to agree on a change in Jonathan's placement after the IEP meeting, and Henrico requested a due process hearing. In the hearing, the Spielbergs claimed a predetermination of placement. Both the local and the state hearing officers held that Henrico had not violated the parents' procedural rights, and the final state decision found that Henrico's proposed day school program was "state of the art" and offered Jonathan FAPE.

The parents appealed to federal district court. Jurisdiction was based upon 20 U.S.C. §1415(e) and 28 U.S.C. §1331. Following a brief trial, the district court initially ruled that Henrico had violated the parents'

procedural rights when it "determined" to change Jonathan's placement prior to development of a new IEP. App. 55 (emphasis added).

The trial court grounded its conclusion upon a September 13, 1985 letter sent before the IEP meeting with the Spielbergs. In that letter, Henrico notified the parents of its proposal to change Jonathan's placement after revisions in Jonathan's IEP were considered in an IEP meeting. The district court found that although the notice expressly stated that a placement decision would be made <u>after</u> revision of Jonathan's IEP, "the clear import of the letter is that the decision to place Jonathan in the day program at Virginia Randolph had been made." App. 55. This, the court said, violated its view that "a placement decision can only be made after

the development of an IEP and in accordance therewith." App. 55 (citation omitted). In a footnote, the court explained this finding by its analysis that the EAHCA regulatory scheme calls for "a notice and a 'placement' meeting after the I.E.P. is developed and before a change in placement is made." App. 59.

Some nine months later, the district court vacated its earlier ruling and found for Henrico on the issue of procedural compliance. It ruled that 34 C.F.R. §300.552 "is not a procedural requirement that the placement decision follow the development of the IEP." App. 41. It based its conclusion on the fact that 34 C.F.R. §300.347 and the Fourth Circuit's unpublished decision in Patterson C. v. Board of Education of Prince George's County, Maryland, No. 86-2638 (4th Cir. May 7, 1987), indicates

that consideration of placement changes may precede IEP development. However, the district court did not readdress its previous finding "that the defendants had resolved to place Jonathan at Virginia Randolph prior to the I.E.P. meeting" because there was no need to do so given its conclusion that the School Board was procedurally correct as a matter of law. App. 35 (emphasis added).

When Henrico challenged another portion of the district court's decision in the Fourth Circuit, the Spielbergs cross-appealed the adverse procedural compliance ruling. In the appeals court, Henrico defended the district court's procedural compliance result, and Henrico buttressed its defense with an attack on the district court's unmodified finding of fact as being predicated upon an erroneous view of the law as well as

being clearly erroneous under F.R.C.P. 52(a).

Nevertheless, the Court of Appeals expressly relied upon the district court's finding of fact in ruling against Henrico, but it never acknowledged or addressed Henrico's two assignments of error to that finding.[1]

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[1] Henrico understands that, under the pressure of burgeoning caseloads, a detailed appellate court discourse on every point raised is neither possible nor desirable. Nonetheless, given the contrary result in the trial court and the two administrative hearings, and given the conflict with Hudson v. Wilson, 828 F.2d 1059 (4th Cir. 1987) (no procedural violation even though placement decision made and IEP drafted before IEP meeting), and Jackson v. Franklin County School Board, 806 F.2d 623 (5th Cir. 1986) (school officials violated EAHCA because they did not send a prior written notice proposing a change in placement and then convene an IEP meeting to discuss a placement change), more than a superficial statement of an appellate conclusion was justified in this case. Henrico

The court held that although there was a "series of letters and meetings between school officials and the Spielbergs" and even though "a new IEP" had been prepared with parental participation, Henrico violated the "spirit and intent of the EHA which emphasizes parental involvement." App. 5, 13. The court reasoned that 34 C.F.R. §300.552(a)(2) requires preparation of an IEP before a placement decision is made. App. 11-12. Therefore, in the court's view, "when they resolved to educate Jonathan Spielberg at Randolph, and then developed an IEP to carry out their decision," Henrico officials relegated the parents to "[a]fter the fact involvement." App.

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[1] (cont'd.) does not believe there was meaningful appellate review because the Fourth Circuit did not even consider Henrico's vigorous challenges to the contested finding of fact.

14, 13 (emphasis added).

However, contrary to its "IEP before placement" reading of 34 C.F.R. §300.552, the Fourth Circuit panel acknowledged that "in some instances, the placement decision can precede IEP development." App. 13. It noted that 34 C.F.R. §300.347 requires private school officials to participate in IEP development, and it claimed that §300.347 created a private school "exception" to the "general rule." App. 14. The court conceded that "34 C.F.R. §300.347 calls for the private school which a child will attend to participate in IEP development," and it suggested that this section allows school officials to "predetermine placement" if a child is to be placed in a private school but not a public school. App. 13-14.

Unfortunately, the Court of Appeals never indicated how, if an IEP

meeting is to secure parental involvement before any placement consideration is undertaken, school officials could decide to invite private school officials to come to the IEP meeting without the effect of predetermining placement into the private school.

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit's "Zero Tolerance" Test For Assessing EAHCA Procedural Compliance Destroys The Balancing Of Rowley's "Adequate Compliance" Standard And Distorts Judicial Assessment Of Alleged Procedural Violations And The Fashioning Of Appropriate Relief.

A. The "Zero Tolerance" Test, Which Ignores Underlying Circumstances, Curative Factors, Or The Duration And Relative Significance Of An Alleged Violation, Erroneously Disregards The Competing Interests In EAHCA Procedural Compliance Cases.

In rejecting parental contentions that "maximization" of a child's potential is mandated by EAHCA, this Court's Rowley opinion grounded its decision on the "legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." Board of Education of Hendrick Hudson Central School District

v. Rowley, 458 U.S. 176, 206 (1982) (emphasis added). By formulating a reasonableness standard for review of EAHCA's "elaborate and highly specific" procedures, Rowley deliberately balanced parental desires for hypertechnicality against the natural tendency of school officials to focus upon service delivery. Id. at 205.

In a very real sense, this case is the procedural compliance analogue of Rowley's "maximization" v. "access" debate about EAHCA substantive compliance. As such, it calls for the same balanced response from the Court.

In Spielberg, the Fourth Circuit disregarded Rowley's "adequate compliance" standard. By applying reasoning developed under entirely different facts and circumstances, the Fourth Circuit created a "zero tolerance"

test which ignores context, mitigating events, duration, or the relative significance of alleged violations.

The precedent cited in Spielberg is Hall v. Vance County Board of Education, 774 F.2d 629, 634-5 (4th Cir. 1985), a decision which addressed a North Carolina school district's "consistent failure to comply with the Act's requirements" with respect to parental notice and development of an IEP. To remedy prolonged and fundamental procedural violations, the Fourth Circuit announced that "[u]nder Rowley, these failures to meet the Act's procedural requirements are adequate grounds by themselves for holding that the school failed to provide a FAPE before January, 1982." Id. at 635 (emphasis added).

Given the aggravated nature of Vance County's failures in James Hall's case,

Hall was a logical application of Rowley's "adequate compliance" test. However, Hall's emphasis upon the violation of "fundamental procedures" over an extended period of time reasonably suggested that relatively minor infractions or merely technical violations which were mitigated or offset by other circumstances would not be viewed as a denial of FAPE. Id. at 635. See also Hudson, 828 F.2d at 1063 ("serious procedural noncompliance can by itself support a finding that the child has not been provided with a FAPE") (citing Hall).

Spielberg totally ignored that implication. This case has transformed Hall from a tool to correct prolonged breaches of basic EAHCA procedures into a "zero tolerance" test which finds there is a denial of FAPE whenever any

procedural violation is found, no matter how harmless or insignificant.

Stripped to its ultimate conclusion, the Fourth Circuit panel decided that because Henrico sent the 34 C.F.R. §300.504(a) notice of a proposed change in placement before, rather than after, an IEP meeting with the Spielbergs, "[t]his failure to follow EHA procedures is sufficient to hold that the defendants failed to provide Jonathan with a FAPE." App. 14 (citing Hall).

This result is wrong for two basic reasons. First, Henrico's actions did not constitute a violation of EAHCA procedures. Under the United States Department of Education (hereinafter "Department") interpretation of the federal special education regulations, school officials may consider placement options prior to the IEP meeting. 34

C.F.R. Part 300, Appendix C, Question 8 at 77 (1987) ("placement options could be discussed at the eligibility meeting"); Question 55 at 87 (agency staff may come to IEP meeting with a "recommendation regarding ... the kind of special education and related services to be provided"); Question 59 at 88 (possibility of residential school placement "might be proposed" by school officials "[a]t some point in this process"). See also 34 C.F.R. §104.35(a) (evaluation must be conducted before "any subsequent significant change in placement").

In addition, school officials may, and arguably must, make placement proposals prior to an IEP meeting. Compare 34 C.F.R. §300.504(a) (parents must be given prior written notice of proposals to change placement) with

Question 8 at 77 (placement decisions would be made at the IEP meeting) and Question 32 at 81 (§300.504 notice is required prior to IEP meeting).

Furthermore, in 1980 the Department issued a ruling contrary to the Fourth Circuit's 1988 view that 34 C.F.R. §300.552 prohibits placement decisions prior to IEP meetings.[2] Compare App. 12-13 with U. S. Dept. of Educ., Office of Special Education Programs, Policy Letter (January 23, 1980), Ed. of Handicapped L. Rep. 211:153 (1980) (Maryland by-law which requires placement decision before

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[2] The Fourth Circuit cited Question 42 for the proposition that the IEP "must be written before placement." App. 12. However, 34 C.F.R. §300.342(a) makes it clear that Question 42 simply means that an IEP must be in place "before special education and related services are provided to a child." (emphasis added)

IEP development is not violative of EAHCA).[3]

In fact, if the panel is correct that "[e]ducational placement is based on the IEP," it is impossible to understand why neither 34 C.F.R. §300.505(a)(2) dealing with the content of notices proposing placement changes nor 34 C.F.R. §300.533(a) dealing with the information

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[3] Not only did the Department's January 23, 1980 ruling approve a Maryland by-law which "specifies that the IEP shall be written after the placement decision," the Fourth Circuit actually enforced the same by-law in Patterson C. v. School Board of Prince George's County, Maryland, Case No. 86-2638 (4th Cir. May 7, 1987) (per curiam). The panel's creation of a private school "exception" to reconcile Spielberg with the Department's ruling, Patterson C., and the requirements of 34 C.F.R. § 300.347(a) is flatly prohibited by the applicability of 34 C.F.R. §300.552(a) to "[e]ach handicapped child's educational placement." (emphasis added). Cf. Honig v. Doe, ____ U.S. ____, 108 S.Ct. 592, 605 n.8 (the language of the Act "means what it says").

to be used in making placement decisions even mentions the IEP as the basis for placement decisions. App. 8.

Second, even if Henrico's actions before the IEP meeting did violate EAHCA procedures, the breach did not rise to the level of a denial of FAPE in light of the extensive involvement of the Spielbergs in the IEP development process. As the state review officer found, "[a]lthough there may have been technical violations...such were not significant and prejudicial violations of procedure that seriously compromised the provision of a free appropriate education to Jonathan Spielberg." App. 84.

The evidence is undisputed that (1) Henrico advised the parents in March, 1985 of Henrico's reevaluation plans, (2) in April and September, 1985, Henrico invited the Spielbergs to obtain and

submit outside evaluations at Henrico's expense, (3) in September, 1985, Henrico provided written copies of all of its evaluation reports well in advance of the IEP meetings, (4) also in September, 1985 Henrico gave notice of its placement proposal prior to the IEP meetings to enable the Spielbergs to bring knowledgeable persons with opinions on the proposal, and (5) in October and November, 1985 the Spielbergs and their attorney were active participants in two IEP meetings held to revise Jonathan's IEP. The Fourth Circuit's failure to consider these circumstances led it to conclude that the parents were relegated to "after the fact involvement" which

denied Jonathan FAPE.[4] App. 13.

Henrico submits that Rowley's "adequate compliance" test is the proper standard for EAHCA procedural claims because it serves the best interests of both school districts and handicapped children.

While school officials should be held responsible for fundamental or

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4 The panel's conclusion on this point is also puzzling in light of the Fourth Circuit's previous decision in Hudson, supra. Hudson correctly found that school officials complied with EAHCA even though they had admittedly made a placement decision and drafted an IEP before their IEP meeting with the parents. 828 F.2d at 1062. The Hudson panel accepted the district court's view that the extensive parental involvement in a subsequent IEP meeting satisfied EAHCA requirements. Given the differing outcomes in Spielberg and Hudson, is EAHCA compliance in the Fourth Circuit simply to be a matter of the "luck of the draw" in appellate panels or has Spielberg's "zero tolerance" test superceded Hudson?

prolonged breakdowns in EAHCA compliance, they should not be hamstrung by judicial hypertechnicality which unduly diverts attention from the task of educating their handicapped students. Similarly, handicapped children will benefit most from a special education process which reduces excessive concern about paperwork and procedural compliance in favor of the delivery of individualized programming.

It would be an irony, indeed, if Rowley's emphasis upon the availability of special education to previously unserved children becomes submerged in quibbling about exact procedural compliance. The competing interests demand that the EAHCA procedural compliance standard be a balanced one.

B. The Fourth Circuit's "Zero Tolerance" Test Violates The Court's EAHCA Obligation To Grant "Appropriate Relief" Since A Finding Of Procedural Error Automatically Entitles Parents To The Program They Seek Without Judicial Review As To Its Appropriateness For The Child.

20 U.S.C. §1415(e)(2) directs courts reviewing state administrative decisions to "grant such relief as the court determines is appropriate." However, application of the "zero tolerance" standard in the Fourth Circuit creates the anomalous result that handicapped students will be educated in inappropriate programs if school officials exercise correct judgment in their programming decisions but

incorrectly comply with the Act's procedures.

When the district court initially found Henrico had violated the Spielbergs' procedural rights, and when the Fourth Circuit subsequently reached the same conclusion, both courts ordered Henrico to maintain Jonathan in his current placement. App. 57, 14. However, neither court's decision even considered whether Jonathan's current placement is proper. Indeed, the Fourth Circuit continued Jonathan's current placement even though it expressly found that the district court was wrong in determining that Jonathan's Pennsylvania placement is appropriate. App. 11 n.2.

Judicial failure to consider the child's substantive needs in the event of procedural error runs counter to Congressional intent since the "zero

tolerance" test automatically reverses local educational programming judgments. As this Court has said, "courts must be careful to avoid imposing their view of preferable educational methods upon the States." Rowley, 458 U.S. at 207 (footnote omitted). "[I]t seems highly unlikely that Congress intended courts to overturn a state's choice of appropriate educational theories in a proceeding conducted pursuant to §1415(e)(2)." Id. at 207-08 (footnote omitted).

Henrico's IEP Committee and the final state adminstrative decision concluded that Jonathan's Pennsylvania placement is overly restrictive. App. 81-83. Rather than receive available educational services in his home community, Jonathan is in an institution 250 miles from home. Even if Henrico violated his parents' procedural rights,

Jonathan's placement should still be changed. Jonathan needs the opportunity to receive transitional educational services in his home community before his entitlement to services ends at age 22.

By applying "zero tolerance" to find procedural noncompliance and automatically continuing Jonathan's placement, both the district court and the Fourth Circuit denied Jonathan the "appropriate relief" required by 20 U.S.C. §1415(e)(2). Their failures to conduct a proper review of the evidence and to give "due weight" to the placement decision of the state review officer deprives Jonathan of the ultimate objective of the Act: appropriate educational services. Rowley, 458 U.S. at 206.

Thus, "zero tolerance" is wrong in both its procedural operation and its

substantive outcome. Even if school officials are mistaken in their compliance with EAHCA safeguards, their procedural errors do not invalidate their substantive educational judgments or automatically make parents correct about the placement needs of their children. Cf. Rowley, 458 U.S. at 208 ("Entrusting a child's education to state and local agencies" is in keeping with the "primacy of States in the field of education," given the "'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy.'") (citation omitted)

As a matter of law, any court's automatic acceptance of the parents' preferred placement in the event of a school's procedural error leaves a handicapped child without judicial protection in violation of 20 U.S.C.

§1415(e)(2). In order to grant "appropriate relief" as required by the Act, courts must make independent determinations of the appropriateness of a child's program, even in the case of egregious procedural errors by school officials. The Fourth Circuit's failure to make such a determination in Jonathan's case justifies the intervention of this Court.

II. The "Mental Processes" Test Applied By The Fourth Circuit Is An Unprecedented Departure From This Court's Seminal Analysis Of EAHCA Procedural Protections In Rowley And Its Recent Decision In Honig.

A. Application Of An "Intent" Test To EAHCA Procedural Compliance Undercuts The Act's Requirement of Knowledgeable Decision-Making By School Officials.

Other than in this Fourth Circuit decision, no appellate court in the country has ever examined the "intent" or "mental processes" of school officials in measuring compliance with the procedural protections of EAHCA. Unlike Title VII or antritrust cases where "state of mind" is an essential element of inquiry, the correct test in EAHCA cases is simply "has the State complied with the procedures set forth in the Act?" Rowley, 458 U.S. at 206 (footnote omitted).

The Fourth Circuit apparently believes that school officials may not

have any knowledge or opinions about a handicapped child prior to an IEP meeting without rendering parental involvement in the IEP process "[a]fter the fact." App. 13. However, federal regulations expressly require school officials to be knowledgeable in advance of IEP meetings. See, e.g., 34 C.F.R. §300.531 (pre-IEP evaluation is to provide a "full and individual" review of "the child's educational needs"); 34 C.F.R. § 300.344(b)(2) (public agency must have a representative present at the IEP meeting who "is familiar with the results of the evaluation").

Even more important, school officials may design proposals in advance of IEP meetings as long as it is clear that parents are entitled to participate in the decision process. 34 C.F.R. Part 300, Appendix C, Question 55 at 87 (1987)

(agency school staff members may come to IEP meeting "with evaluation findings, statements of present levels of educational performance, and a recommendation regarding annual goals, short term instructional objectives, and the kind of special education and related services to be provided").

The Fourth Circuit's suggestion that parental involvement is compromised by the efforts of school officials to insure informed decision-making also ignores the Act's assignment of "primary responsibility for formulating the education to be accorded a handicapped child" to "state and local educational agencies in cooperation with the parents or guardian of the child." Rowley, 458 U.S. at 207.

Not only may school officials think about a child's needs in advance of an

IEP meeting, the statutory scheme virtually mandates that they must. Indeed, the Fourth Circuit's position seems to be that professional educators should avoid any consideration of a student's program between IEP meetings or triennial reevaluations, no matter how circumstances change. Henrico contends that as long as parents have input into the educational decisions about their handicapped child, the purpose of the Act's procedures is met.

B. **The Fourth Circuit's Inquiry Into School Officials' "Intent" To Change A Handicapped Child's Educational Placement Prior To An IEP Meeting Will Leave Educators "Hamstrung" Contrary To This Court's Desire In Honig v. Doe.**

The pernicious effects of the Fourth Circuit's reliance upon speculation about what Henrico officials "resolved" go far beyond one child in one Pennsylvania institution. If the "motivation" of school officials becomes a relevant avenue of inquiry in EAHCA procedural compliance cases, special education litigation will expand exponentially.

One area where this case is likely to have immediate impact is the discipline of handicapped students, particularly those who are continually disruptive or truly dangerous to the safety of others.

In Honig, the Court stated that students posing immediate threats to the safety of others may be suspended for up to 10 days. 108 S.Ct. at 605.

> ...[this period] provides a "cooling down" period during which officials can initiate IEP review and seek to persuade the parents to agree to an interim placement.

Id. (emphasis added). Under this formula, which Justice Brennan suggested would "not leave educators hamstrung," school officials would (1) suspend the student for the dangerous or seriously disruptive behavior, (2) schedule an IEP meeting with the parents, and (3) try, presumably in the IEP meeting, to convince the parents that a different program is necessary. 108 S.Ct. at 605.

Honig's formula will not work if Spielberg stands. Under the Fourth Circuit's "mental processes" test, school officials may not even consider whether there is any need to convene an IEP meeting without being in jeopardy of "intending" whatever IEP or placement change results from the IEP meeting.

And, even though Honig envisions the discussion of an "interim placement" during the IEP meeting, Spielberg would condemn the pre-meeting process by which educators explore alternatives and decide which interim placement to recommend to parents in the IEP meeting. Id.

The true danger of the Fourth Circuit's "mental processes" standard is that every action taken by school officials is now subject to attack as "after the fact" of their actual "decision." App. 13. No matter what educators do, every action will be claimed by parents to be illegally "predetermined."

CONCLUSION

A writ of certiorari, or an order summarily reversing the Fourth Circuit's decision on the procedural violation

issue, should be granted by this Court. In addition, in view of both lower courts' failure to properly address Jonathan's substantive placement needs, the final state adminstrative decision in favor of Henrico's proposed program should be reinstated.

HENRICO COUNTY PUBLIC SCHOOLS
MALCOLM M. CHRISTIAN
WILLIAM C. BOSHER, JR.
MORTON BRADMAN
JOANN MARCHANT
GWENDOLYN WHITING
DOROTHY SUGARMAN
DONALD MAYFIELD

By _____
Counsel

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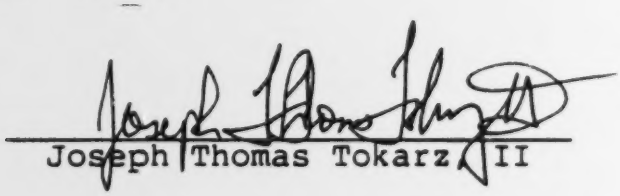
CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of December, 1988, a true and accurate copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit and the separately bound Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit has been hand-delivered to the offices of: Thomas Franklin Guernsey, Esq., Associate Professor of Law, Youth Advocacy Clinic, University of Richmond, Richmond, Virginia 23173 and Kathleen S. Mehfoud, Esq., 411 E. Franklin Street, Suite 602, Richmond, Virginia 23219.



Joseph Thomas Tokarz, II

No. 88-1022

Supreme Court, U.S.
FILED
DEC 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1988

HENRICO COUNTY PUBLIC SCHOOLS, MALCOLM M. CHRISTIAN, WILLIAM C. BOSHER, JR., MORTON BRADMAN, JOANN MARCHANT, PATRICIA MARTIN, GWENDOLYN WHITING, DOROTHY SUGERMAN, and DONALD MAYFIELD,

Defendants/Petitioners,

v.

JONATHAN SPIELBERG, a minor by his parents, Howard and Susan Spielberg, as his next friend; HOWARD SPIELBERG; and SUSAN SPIELBERG,

Plaintiffs/Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-3640

Jonathan Spielberg, a minor, by his parents, Howard and Susan Spielberg, as his next friend; Howard Spielberg; Susan Spielberg,

Plaintiffs-Appellees,

versus

Henrico County Public Schools; Malcolm M. Christian, Chairman, Henrico County School Board; William C. Bosher, Jr., Superintendent, Henrico County Public Schools; Morton Bradman, Assistant Superintendent for Instructional Support Services, Henrico County Public Schools; Joann Marchant, Principal, Virginia Randolph Special Education Center, Henrico County Public Schools; Patricia Martin, Special Education Teacher, Virginia Randolph Special Education Center, Henrico County Public Schools; Gwendolyn Whiting, Home Support Trainer, Virginia Randolph Special Education Center; Dorothy Sugarman, Social Worker, Henrico County Public Schools; School Psychologist, Henrico County Public Schools,

Defendants-Appellants.

No. 87-3643

Jonathan Spielberg, a minor, by his parents, Howard and Susan Spielberg, as his next friend; Howard Spielberg; Susan Spielberg,

Plaintiffs-Appellants,

versus

Henrico County Public Schools; Malcolm M. Christian, Chairman, Henrico County School Board; William C. Bosher, Jr., Superintendent, Henrico County Public Schools; Morton Bradman; Assistant Superintendent for Instructional Support Services, Henrico County Public Schools; Joann Marchant, Principal, Virginia Randolph Special Education Center, Henrico County Public Schools; Patricia Martin, Special Education Teacher, Virginia Randolph Special Education Center, Henrico County Public Schools; Gwendolyn Whiting, Home Support Trainer, Virginia Randolph Special Education Center; Dorothy Sugarman, Social Worker, Henrico County Public Schools; School Psychologist, Henrico County Public Schools,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond, Robert R. Merhige, Jr., Senior District Judge. (CA-86-304)

Argued: April 6, 1988 Decided: August 5, 1988

Before WIDENER, ERVIN, and WILKINS, Circuit Judges.

Joseph T. Tokarz, II for Appellants; Thomas Franklin Guernsey for Appellees.

ERVIN, Circuit Judge:

Jonathan Spielberg is a severely retarded nineteen year old resident of Henrico County, Virginia. Since 1977, the Henrico County Public Schools have paid the full cost of his education at the Melmark School ("Melmark"), a residential facility in Pennsylvania, under the Education of All Handicapped Children Act ("EHA"), 20 U.S.C. § 1401, et seq. In March 1985, the county initiated a reevaluation of Jonathan's placement which concluded that he could be educated at a local school. His parents appealed that decision, seeking

to continue his institutional placement. The district court reversed the state administrative decision, first finding that the county violated EHA procedures, and on reconsideration finding that Jonathan requires institutional placement. We affirm based on procedural violations of the EHA.

I.

Jonathan Spielberg possesses the functional skills of an eighteen month old child. His capabilities are extremely limited, and his individualized education programs ("IEP") at Melmark have concentrated on survival skills, such as toilet training. At Melmark, where he continues to study under the "stay put" provision of the EHA, 20 U.S.C. §1415(e)(3), he goes to school

throughout the year and receives after school and evening care and training.

The 1985 reevaluation began only nine months after a regular triennial evaluation which continued Jonathan's Melmark placement. From the beginning, county officials focused on a new placement at Virginia Randolph Special Education Center ("Randolph"), a public facility in Henrico County. After a series of letters and meetings between school officials and the Spielbergs, a new IEP was drawn up providing for Jonathan to attend Randolph during the day while living at home. He would attend school 5-1/2 hours per day during a nine month school year and four hours daily during a six week summer session. After school activities would be home-based, involving either his parents or a hired caretaker, with training available

for them from a trainer provided by the school.

The Spielbergs first appealed the placement decision administratively. The local hearing officer concluded that there were no procedural violations of the EHA, and that the new IEP was appropriate, but that Jonathan required residential placement at Melmark. The state reviewing officer affirmed on the procedural compliance issue, but reversed on the placement issue, finding Randolph placement to be appropriate. The Spielbergs appealed this decision to the district court under 20 U.S.C. § 1415 (e)(2).

The district court initially found that the school system violated EHA procedure by determining appropriate placement before developing an IEP. See 34 C.F.R. § 300.552. The court based its

finding on a series of letters written before the IEP meeting held in November, 1985, which focused on a change from Melmark to Randolph. Based on the procedural violation, the court ordered the continuation of Melmark placement.

The court subsequently vacated its initial decision in light of 34 C.F.R. § 300.347 and Patterson C. v. Board of Education of Prince George's County, No. M-85-3948 (D. Md. Sept. 23, 1986), aff'd, No. 86-2638 (4th Cir. May 7, 1987)(per curiam). In Patterson C., the courts affirmed an IEP developed after placement in a private school was decided. Section 300.347 specifically calls for a chosen private school to participate in IEP development. After vacating his earlier decision, however, Judge Merhige reached the same result on the merits. He found that the burden of

proof was on the defendants as they were seeking to change Jonathan's placement. He further found that they had not carried that burden by showing that Jonathan would receive educational benefits at Randolph. Therefore, he ordered the Melmark placement to continue. The defendants appeal his decision regarding placement, and the Spielbergs appeal his finding of procedural compliance.

II.

Congress, through the EHA, uses federal money to induce the states to provide handicapped students with a free appropriate public education ("FAPE"). An IEP is developed for each handicapped child by school officials and the child's parents. Educational placement is based on the IEP, which is revised annually.

Disputes regarding the IEP or placement are subject to administrative and judicial review.

In judicially reviewing the administrative outcome, the courts should make "independent decisions based on a preponderance of the evidence." Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 205 (1982); see 20 U.S.C. § 1415(e)(2).[1]

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1 20 U.S.C. § 1415(e)(2) provides:

> Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the

Due weight shall be given to state administrative proceedings, as the primary responsibility for developing IEPs belongs to state and local agencies in cooperation with the parents, not the courts. Rowley, 458 U.S. at 206-207. The reviewing court should make two inquiries: (1) Did the school board procedurally comply with the EHA and its implementing regulations? (2) Is the IEP reasonably calculated to provide

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1 (cont'd) administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

educational benefits to the child? Id.[2]

The district court found that the defendants decided to change Jonathan's placement from Melmark to Randolph before developing a new IEP to support the change. Under the EHA, the general rule is that placement should be based on the

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[2] The district court based its decision on the defendant's failure to prove that the proposed placement at Randolph was reasonably calculated to provide educational benefits. It assigned the burden of proof to the defendants as the party seeking to change Jonathan's placement. See Burger v. Murray City School District, 612 F. Supp. 434 (N.D. Ga. 1984). The burden, however, is more properly allocated to the party bringing the civil action to challenge the state administrative decision. See Tracey T. v. McDaniel, 610 F. Supp. 947 (N.D. Ga. 1985). Although we reach the same result as the district court based on procedural noncompliance, infra, we cannot affirm its reasoning because of this misallocation of the burden of proof.

IEP. 34 C.F.R. §300.552.[3] The appendix interpreting the EHA regulations states that "IEP objectives must be written before placement." 34 C.F.R. Part 300, App. C., Question 42. The decision to

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[3] 34 C.F.R. §300.552. provides:

§ 300.552 Placements.
Each public agency shall insure that:

(a) Each handicapped child's educational placement: (1) Is determined at least annually, (2) Is based on his or her individualized education program, and (3) Is as close as possible to the child's home;

(b) The various alternative placements included under § 300.551 are available to the extent necessary to implement the individualized education program for each handicapped child;

(c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped; and

(d) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs.

place Jonathan at Randolph before developing an IEP on which to base that placement violates this regulation as interpreted by the Secretary of Education. It also violates the spirit and intent of the EHA, which emphasizes parental involvement. After the fact involvement is not enough.

The court below vacated its initial finding of procedural noncompliance because in some instances, the placement decision can precede IEP development. See Patterson C., supra. 34 C.F.R. §300.347 calls for the private school which a child will attend to participate in IEP development. Patterson C. and §300.347, however, reflect the need to include any outside parties like private schools in IEP development. In the majority of cases, the child will be educated in public facilities, not

private ones. Thus, there is no reason to predetermine placement and involve representatives of the chosen private school in IEP development. Since Randolph is a public school, the general rule, not the exception, applies, and placement should have followed IEP development.

The defendants violated EHA procedures when they resolved to educate Jonathan Spielberg at Randolph, and then developed an IEP to carry out their decision. This failure to follow EHA procedures is sufficent to hold that the defendants failed to provide Jonathan with a FAPE. See Hall v. Vance Cty. Bd. of Educ., 744 F.2d 629, 635 (4th Cir. 1985). Therefore, the district court order that he remain in his current placement is

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 87-3640
No. 87-3643

Jonathan Spielberg, et al.

Plaintiffs-Appellees,

v.

Henrico County Public Schools, et al,

Defendants - Appellants.

On Petition for Rehearing with Suggestion for Rehearing In Banc

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Upon consideration of the motion of the Virginia School Boards Association for leave to appear as amicus curiae on rehearing,

IT IS ORDERED that the motion is denied.

The apellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for the rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Ervin, with the concurrence of Judge Widener and Judge Wilkins.

For the Court

[signed]

_____

CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

JONATHAN SPIELBERG, et al., Plaintiffs,	)	
v.	)	Civil Action No. 86-0304-R
HENRICO COUNTY PUBLIC SCHOOLS, et al., Defendants.	)	

MEMORANDUM

This matter comes before the Court on defendants' Motion to Alter or Amend Judgment. See Fed.R.Civ.P. 59(e). The parties having briefed and argued the matter, it is ripe for disposition.

Procedural Background

In its memorandum opinion of January 23, 1987, the Court held that the defendants[1] violated the applicable procedures of the Education of All Handicapped Children Act (EAHCA) in

determining to change plaintiff Jonathon Spielberg's educational placement prior to the development of his Individualized Education Program (I.E.P.). The Court concluded that, because of this procedural violation, Jonathon was entitled to remain in his then-current placement. Consequently, it did not address the second issue raised by the plaintiffs: whether Jonathon can receive an appropriate education at the Virginia Randolph Special Education Center (Virginia Randolph), the placement proposed by the defendants.

In the motion before the Court, the defendants seek a judicial determination of the educational placement issue left unresolved by the Court. Additionally, the defendants seek a modification of the Court's earlier opinion to reflect that the defendants did not violate the

procedures of the EAHCA and applicable regulations.

After considering the matter, the Court will address the placement issue and determine whether Jonathan can receive an appropriate education at Virginia Randolph. The Court will additionally reconsider its earlier ruling and determine the correctness of its original conclusion that the plaintiffs are entitled to relief on the basis of an alleged procedural violation.

Though the Court, in its memorandum of January 23, 1987 briefly recited the factual aspects of this litigation in the interest of a, hopefully, better understanding of the Court's conclusion reference the pending issues, the Court will enlarge upon its factual findings.

Jonathon Spielberg is an eighteen year-old handicapped child who is severely and

profoundly mentally retarded. In addition to his extremely low cognitive abilities, Jonathon has little ability to "generalize" his experiences, with the result that those skills acquired in one environment, even as part of a regular routine, are not easily transferred to other environments. Because of his minimal intellectual capabilities, Jonathon's educational goals focus on attaining self-help skills such as those relating to toileting, dressing, eating, mobility, and leisure. The parties have stipulated that the child is capable of continued learning.

Since 1977, Jonathon has been enrolled in a residential educational program at Melmark, an educational facility located in Berwyn, Pennsylvania. The funding for Jonathon's education at Melmark has been provided by Henrico County pursuant to

state and federal law. See 20 U.S.C. §§ 1411 to 1420; Va. Code §22.1-218. Each year, in accordance with special education regulations, Melmark has developed an I.E.P. for Jonathon which was then approved by the defendant Henrico County Public Schools. This process continued up through and including the May, 1985 I.E.P.

Beginning in March, 1985, the defendants began to take a more active role in Jonathon's education. Specifically, defendant Morton Bradman informed the plaintiffs by letter that Jonathon would be reevaluated in the month of April "to determine an appropriate placement for him...." Joint Exhibit 101. A subsequent letter noted that Jonathon was the only handicapped child from Henrico whose education was provided outside the state and explained

that the primary purpose of the reevaluation was to "determine if we can offer an appropriate program for Jonathon in [Henrico]...." Joint Exhibit 103.

Ultimately, the result of the reevaluation was a determination by the defendants that Jonathon could receive an appropriate education at Virginia Randolph. Virginia Randolph is an educational facility designed to meet the needs of emotionally disturbed, trainable mentally retarded or severely and profoundly handicapped children. At present, of approximately 133 students attending the school, 49 are severely and profoundly handicapped, and 15 of those are over the age of 15 years. The severely and profoundly handicapped exhibit characteristics of I.Q.s lower than 20, poor self-help skills, need for prompting, and lack of awareness of

danger. Some children have aggressive tendencies, some have tantrums, some are non-ambulatory. During school hours, Virginia Randolph offers the appropriate educational and related services to establish itself as a "state of the art" school. It does not, however, provide services beyond the school day as part of its regular program. Instead, a person is employed full time to assist parents or other caretakers in developing programs for the home. This person is referred to as a "home trainer."

After giving notice of their intention to propose a change in Jonathon's placement, the defendants met with the plaintiffs and others on October 29 and November 4, 1985, to revise Jonathon's I.E.P. Those meetings, however, failed to yield a program that was completely acceptable to all parties. Additionally,

the parties could not agree on whether Jonathon's educational needs could be met in a daily, as opposed to residential, setting.

The plaintiffs subsequently sought a due process hearing as provided in the EAHCA and Virginia law. The plaintiffs raised three general issues: (1) the appropriateness of the I.E.P. proposed by defendants; (2) the appropriateness of the proposed change of placement from a residential program to a daily program; and (3) alleged violations of plaintiffs' procedural rights under the law.

These three issues were addressed to a Hearing Officer who took evidence and issued an exhaustive Post Hearing Report on March 5, 1986. The Hearing Officer, after making certain modifications, approved the defendants' proposed I.E.P. He determined, however, that Jonathon

could not receive an appropriate education in a daily program such as that proposed in connection with Virginia Randolph. Finally, he concluded that the plaintiffs' procedural rights had not been violated.

The parties filed cross appeals on the Hearing Officer's rulings respecting the proposed placement and procedural rights issues. A Reviewing Officer heard the appeals and issued a report reversing the Hearing Officer's conclusion that the Virginia Randolph placement was inappropriate and affirming the Hearing Officer's failure to find a procedural violation. The plaintiffs appealed these adverse determinations to this Court pursuant to 20 U.S.C. §1415.

On January 23, 1987, after hearing testimony from witnesses and reviewing the documentary evidence on file, the

Court entered a memorandum opinion disposing of the case on one of the two grounds presented. The defendants subsequently filed the instant motion to alter or amend that judgment.

The Appropriate Placement

The first issue presented by the defendants' motion is whether Jonathon can receive an appropriate education at Virginia Randolph. Because it is the defendants who advocate that Jonathon be moved from his current placement at Melmark, where he is concededly receiving an appropriate education, the burden of establishing the propriety of the Virginia Randolph placement by a preponderance of the evidence is on the defendants. See Burger v. Murray County School District, 612 F. Supp. 434 (N.D. Ga. 1984); 20 U.S.C. §1415(e)(2).

To demonstrate that a given placement is appropriate, the proponents must show that the child can "benefit educationally" from the instruction and related services provided. See Hendrick Hudson District Board of Education v. Rowley, 458 U.S. 176, 203 (1982). Phrased another way, the defendants must satisfy the Court that the proposed educational placement is reasonably calculated to enable the child to receive educational benefits. See, e.g., Hall by Hall v. Vance City Board of Education, 774 F.2d 629, 635 (4th Cir. 1985). As the Hall court noted, however, the Supreme Court has recognized "that no single substantive standard can describe how much educational benefit is sufficient to satisfy..." the requirements of the EAHCA. "Instead, the Supreme Court left that matter to the

courts for a case-by-case determination.... Clearly, [however], Congress did not intend that a school system could discharge its duty under the EAHCA by providing a program that produces some minimal academic advancement, no matter how trivial." Hall, supra, 774 F.2d at 635-36.

The Hearing Officer found that the defendants had failed to prove that Jonathon can receive sufficient educational benefit from the program at Virginia Randolph. After reviewing Jonathon's educational goals as indicated by his I.E.P., including the development of self-feeding, grooming, dressing, and toileting skills, the Hearing Officer determined, in accordance with the expert testimony he had received, that Jonathon's educational needs cannot be met in a daily program such as that

proposed by the defendants. In essence, he found that Jonathon's educational activities need to be carried out continuously to provide educational benefit.

The Hearing Officer further found that Jonathon's unique educational goals need to be addressed in an environment of such consistency and structure that a residential component is required.

Based on the above findings, the Hearing Officer concluded that the proposed day program does not offer an appropriate public education for Jonathon.

The Reviewing Officer rejected the Hearing Officer's conclusion that Jonathon requires more than the day program to receive an appropriate education. The Reviewing Officer based his analysis on an examination of

Jonathon's present educational program at Melmark and Jonathon's progress there. He first noted that Jonathon is receiving educational benefit at Melmark, a fact not disputed by the parties. He found, however, that based on the down/dead time, non-functional activities, and inconsistent carryover to the living environment, the Melmark program does not provide consistency and structure. Accordingly, the Reviewing Officer found, contrary to the finding of the Hearing Officer, that Jonathon does not need consistency and structure to receive that Jonathon does not need consistency and structure to receive educational benefit. He went on to find that the residential placement at Melmark is primarily custodial, and not educational.

Based on these findings, and without directly addressing the Hearing Officer's

finding that Jonathon's educational activities need to be carried out continuously, the Reviewing Officer concluded that Jonathon can receive an appropriate education at Virginia Randolph.

After reviewing the evidence in the case, this Court concludes that the defendants have not met their burden of establishing that Virginia Randolph is an appropriate placement for Jonathon. This conclusion is based on the limited nature of the Virginia Randolph program in comparison to the broad character of Jonathon's educational goals.

A review of Jonathon's I.E.P. establishes that the bulk of his educational goals consist of mastering activities which arise in "daily living"; that is, when Jonathon arises in the morning, when he eats his meals, when he

bathes, and when there is need for toileting. These activities or skills are needed throughout Jonathon's waking hours and cannot be contained within a six-hour period of the day. The I.E.P. itself, which, as modified by the Hearing Officer, has not been challenged by any of the parties, states that these activities are to be carried out in all appropriate environments. Clearly, the appropriate environment for such activities is not limited to six hours at an educational facility, even one that is "state of the art." This Court agrees with the Hearing Officer that "[b]ecause this child cannot learn in the abstract and cannot generalize skills from one environment into another and because the skills which this child needs to acquire are directly and predominantly associated with activities beyond a classroom, it is

found that the short-term instructional objectives would be meaningless to the Annual Goals if applied only during day program hours."

The parties do not dispute that Jonathon has made educational progress at Melmark. None of the parties, however, would describe Jonathon's progress there as "rapid" or "great," nor could they. Jonathon's acquisition of self-help skills is necessarily incremental. The program proposed by the defendants, however, contemplates much less instructional time than is now provided to Jonathon over the course of a year. Many of the activities reflected in Jonathon's I.E.P. are those naturally engaged in during the hours sought to be eliminated from his current program, including in whole or in part dressing, eating, toileting, and grooming. While

Jonathon may be able to derive some theoretical educational benefit from defendants' program with respect to these activities, the Court concludes that any such benefit would not satisfy the requirements of Rowley and Hall.

Because the defendants have not demonstrated that the proposed placement at Virginia Randolph is reasonably calculated to provide educational benefit to Jonathon, defendants may not change Jonathon's current placement at this time.

The Placement Decision

The second issue presented by the defendants' motion to alter or amend judgment is whether the Court erred in concluding that the defendants had committed a procedural violation by determining to change Jonathon's

placement prior to the development of his I.E.P. See Memorandum Opinion at 7 (January 23, 1987). After reconsidering the matter, the Court concludes that its earlier determination was in error.

The basis for the Court's earlier opinion was that the defendants violated the regulation requiring the responsible public agency to insure that each handicapped child's educational placement is based on his or her I.E.P. See 34 C.F.R. §300.552. The Court found that the defendants had resolved to place Jonathon at Virginia Randolph prior to the I.E.P. meeting. Because the I.E.P. is developed at the I.E.P. meeting, see 34 C.F.R. § 300.343, the Court reasoned that the defendants' placement decision could not have been based on Jonathon's I.E.P.

The stated reasoning is flawed, however, because it assumes that the I.E.P. must be finalized before a placement decision may be made. The Court concludes, upon reconsideration, that under some circumstances, the placement decision must be made prior to the development of the I.E.P. See Patterson C. v. Board of Education of Prince George's County, No. M-85-3948 (D.Md. Sept. 23, 1986), aff'd, No. 86-2638 (4th Cir. May 7, 1987) (per curiam).

In Patterson C., a mentally retarded and emotionally disturbed teenager was committed to a shelter home by a juvenile court in February 1985 after sexually assaulting other children. Thereafter, an Admission, Review and Dismissal Committee (ARD) met in late February, developed a proposed I.E.P., and recommended that the child be placed in a

nonpublic daily or residential educational facility.

The ARD recommendation was accepted by the local school board and on April 1, 1985 a financial agreement was reached between the board and the county Department of Social Services to fund a residential program for the child. After receiving the results of a physical and psychological evaluation of the child from Johns Hopkins University Hospital, the board forwarded his educational records together with the evaluation to several residential educational facilities in the hope that one would accept the child. Not until October 1985 was the child accepted by such a facility and he was enrolled finally on December 9, 1985.

In the meantime, the child sought a due process hearing for, inter alia, alleged

violations of certain state and federal educational guidelines. Specifically, the child alleged that the board had failed to implement his I.E.P. within thirty days of its completion as required by Maryland regulations. Alternatively, the child contended that the board had violated the regulation mandating that an I.E.P. be developed within thirty days after the placement decision is made.

Ultimately, the case came before the district court for the District of Maryland which rejected both of the child's contentions. First, the court affirmed the administrative officer's finding that the February I.E.P. drafted by ARD was merely "proposed" and thus was not a final I.E.P. required to be implemented within thirty days. Second, the court concluded that the April 1 agreement between the board and the

Department of Social Services to find a residential education for the child was not a placement decision triggering the thirty-day limitation for developing an I.E.P. Instead, the court concluded that only the determination to place the child at a specific institution constituted a "placement decision" for purposes of the regulation.

The child appealed and the United States Court of Appeals for the Fourth Circuit affirmed the decision below, primarily for the reasons given by the district court. In resolving the second placement issue, however, the Fourth Circuit also relied on 34 C.F.R. §300.347(a)(2). That section provides that in developing I.E.P.s for children to be placed in private schools, "[t]he [responsible public] agency shall insure that a representative of the private

school attends the [I.E.P. development] meeting." The Fourth Circuit noted that compliance with this regulation was impossible until the board had located a specific school in which to place the child. Therefore, no "placement decision" could have been made prior to such time.

Based on Patterson C., this Court concludes that it misinterpreted 34 C.F.R. §300.552 as a procedural requirement that the placement decision chronologically follow the development of the I.E.P. Two aspects of Patterson C. support this conclusion. First, Patterson C. involved the interpretation of a state regulation requiring that an I.E.P. be developed no later than thirty days after the placement decision is made. See Md. Admin. Code tit. 13A, § 05.01.06. Although that provision was

not challenged as contrary to 34 C.F.R. § 300.552, the Court finds the Maryland provision persuasive in construing the federal regulation. Second, and more significantly, the Fourth Circuit in affirming the district court relied on a federal regulation which in essence mandates that a placement decision be made before an I.E.P. is fully developed in certain cases. See 34 C.F.R. §300.347; see also 34 C.F.R. Pt. 300, App. C, Question 59 at 88 (1986).

To summarize, in light of Patterson C. and 34 C.F.R. §300.347, the Court concludes that 34 C.F.R. §300.552, which states that each public agency shall insure that a handicapped child's placement is based on his or her I.E.P., is not a procedural requirement that the placement decision follow the development of the I.E.P. Therefore, the Court's

earlier determination that the defendants had violated this provision was erroneous.[2] Furthermore, after reviewing the evidence, the Court determines that plaintiffs' remaining claims regarding an alleged procedural violation are meritless. Accordingly, the Court will vacate its earlier opinion.

Conclusion

For the above stated reasons, the Court concludes that the defendants have not met their burden of establishing that the proposed placement of Jonathon Spielberg at Virginia Randolph Special Education Center is reasonably calculated to provide educational benefit. Therefore, defendants may not change Jonathon's placement at this time.

Additionally, upon further consideration, the Court concludes that the defendants did not commit a

procedural violation in determining to change Jonathon's placement. Accordingly, the Court's Memorandum Opinion of January 23, 1987, will be vacated.

An appropriate order shall issue.

[signed]

UNITED STATES DISTRICT JUDGE

Date 8 OCT 1987

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1 The term "defendants" as used throughout this Memorandum is used for convenience and may refer to any or all of the named defendants.

2 Because it determines that 34 C.F.R. §300.552 is not a procedural regulation, the Court need not provide a definitive construction of the provision. To the extent that the regulation is substantive in nature, however, the Court is of the view that its discussion regarding the appropriateness of the proposed placement addresses the requirement.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

JONATHAN SPIELBERG, et al., Plaintiffs,	)	
v.	)	Civil Action No. 86-0304-R
HENRICO COUNTY PUBLIC SCHOOLS, et al., Defendants.	)	

MEMORANDUM

The plaintiffs in this matter, Jonathon Spielberg, a minor, and his parents Howard and Susan Spielberg, filed this action against the Henrico County Public Schools (Henrico) and numerous school district employees (collectively "the defendants"), alleging violations of the Education of All Handicapped Children Act (the Act), Virginia state law, and plaintiffs' constitutional right to procedural due process. Jurisdiction is premised on 28 U.S.C. §1331 and 20 U.S.C.

§1415. Upon motion of the defendants and after a hearing, the Court dismissed plaintiffs' claim based upon the due process clause. The remaining claims were heard by the Court and the matter was taken under advisement pending the Court's review of the extensive exhibits filed in this action. Having considered the matter, the Court is now ready to render its opinion.

Background

Jonathon Spielberg is a handicapped child who is severely and profoundly mentally retarded as well as autistic. Since 1973, Jonathon has been enrolled in a residential educational program at Melmark in Berwyn, Pennsylvania. Melmark provides a "twenty-four hour" program to Jonathon whose educational goals focus on self-help skills such as those relating

to toileting, dressing, eating, mobility, and leisure. From 1977 to the present, the funding for Jonathon's education has been provided by Henrico County pursuant to state and federal law. See 20 U.S.C. §§ 1411 to 1420; Va. Code § 22.1-218. Jonathon remains at Melmark pending the outcome of this action. The parties have stipulated that Jonathon is capable of continued learning.

The instant case arose from Henrico's determination that Jonathon could be placed in a day program and still receive the free appropriate public education to which he is entitled. See Va. Code §22.1-215; see also 20 U.S.C. §1412. The plaintiffs challenged this determination before the local Hearing Officer on two grounds: first, that the determination itself was made in violation of the procedures set forth by state and federal

law, and second, that the proposed placement would not provide Jonathon an appropriate education as required. The Hearing Officer, after taking evidence and reviewing the memoranda submitted in the cause, ruled that Henrico failed to meet its burden of demonstrating that its proposed placement would provide Jonathon sufficient educational benefit to constitute an appropriate education and that Henrico had not substantially violated the procedural rights of the plaintiffs. Subsequently, both of these rulings were put before a Review Officer who issued an opinion reversing that portion of the Hearing Officer's decision adverse to Henrico. The plaintiffs subsequently filed this action pursuant to 20 U.S.C. §1415 challenging the Review Officer's decision.

Merits

In this action the plaintiffs raise the same two grounds decided adversely to them below. First, plaintiffs allege that the defendants failed to follow the requisite procedures in determining Jonathon's placement. Second, the plaintiffs contend that the proposed placement and corresponding educational program do not provide an "appropriate education" to Jonathon as that term is defined by law. Because this Court is satisfied that the defendants did not adhere to the proper procedures in determining to change Jonathon's placement, it expresses no opinion as to the propriety of the program.[1]

1. Scope of the Review

The United States Supreme Court has expressly delineated a court's scope of review in suits brought under 20 U.S.C.

§1415. A court's inquiry is twofold: "First, has the State complied with the procedures set forth in the Act? And second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" Hendrick Hudson District Board of Education v. Rowley, 458 U.S. 176, 206-07 (1982). In limiting the substantive review accorded by the second prong of the inquiry, the Court emphasized the significance of the procedural review contained in the first. "When the elaborate and highly specific procedural safeguards embodied in §1415 are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards

cannot be gainsaid." Rowley, supra, 458 U.S. at 205.

Although the Court referred specifically to compliance with those procedures contained in §1415, entitled "Procedural safeguards," it is evident that a reviewing court's inquiry is not so limited. The Supreme Court specifically stated that a court must satisfy itself that the state has adopted the state plan, policies, and assurances required by the Act. Rowley, supra, 458 U.S. at 206 n.27. This emphasis on procedural regularity is grounded in the assumption that, to the extent the procedural mechanisms are employed, a handicapped child will be afforded an appropriate education. Consequently, a violation of these procedures provides the basis for granting appropriate

relief. Such a violation has occurred in the present case.

2. The Placement Determination

The "free appropriate public education" to which each handicapped child is entitled under the Act is based upon the "individualized educational program" (I.E.P.) that must be developed for each child. The I.E.P. consists of a written document containing

> (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which said child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

20 U.S.C. §1401(19). The I.E.P. is developed at a meeting between a qualified representative of the local educational agency, the child's teacher, and the child's parents. Only after the I.E.P. is in place are special education and related services provided. See 34 CFR §300.342(b)(1). Additionally, and most importantly for this case, a placement decision can only be made after the development of an I.E.P. and in accordance therewith. 34 C.F.R. §§300.533(a)(4), 300.552(a)(2); see also Regulations Governing Special Education Programs for Handicapped Children and Youth in Virginia, 42 (effective Jan. 1, 1985). This latter requirement is logical in light of the contents of the I.E.P. Not until the long and short term goals of the child and the specific educational services to be provided are

determined can an appropriate placement decision be made. Only then does a decisionmaker have a basis for deciding whether the educational needs of the child can be served in a daily, as opposed to residential, program.

In the present case, the Court finds that the defendants resolved to place Jonathon in a daily program prior to the development of his annual I.E.P. and in violation of the procedures prescribed by law. This conclusion is compelled by the documentary and other evidence presented in this action which clearly evince a predetermination of the placement issue.

In July, 1984, Jonathon was given a triennial reevaluation as required by 34 C.F.R. §300.534. On March 22, 1985, however, the defendants sent a notice to the Spielbergs indicating that another reevaluation would be given Jonathon in

the month of April "to determine an appropriate placement for him . . ." Joint Exhibit 101. When the Spielbergs questioned the need for an evaluation only nine months after the triennial examination, the defendants responded that the purpose was to determine Jonathon's "continued eligibility for placement at Melmark School." Joint Exhibit 103.

Shortly after the reevaluation, but long before the I.E.P. meeting in November, counsel for the defendants stated in an August letter to plaintiffs' counsel that because "our evaluation team expects its final reports will conclude that Jonathon can be educated at Virginia Randolph [a daily program facility], the Spielbergs may wish to start arrangements for an independent evaluation now." Joint Exhibit 123. The letter went on to

note that, if Jonathon's program were changed, "Virginia Randolph [would be] the likely location for his day program."

Finally, on September 13, 1985, the defendants notified the Spielbergs that Henrico sought to change Jonathon's placement.[2] Joint Exhibit 127. Although that notice expressly stated that "a different placement [might] ultimately be chosen," the clear import of the letter is that the decision to place Jonathon in the day program at Virginia Randolph had been made.

Taken together, these documents demonstrate that Henrico determined to change Jonathon's placement from Melmark to Virginia Randolph prior to the development of his I.E.P. A special reevaluation was conducted only nine months after the regular triennial evaluation and for the express purpose of

supporting a change in placement. Correspondence subsequent to the special evaluation expresses Henrico's intent to move Jonathon to Virginia Randolph.

Placing a handicapped child without reference to his I.E.P. violates both the letter and the spirit of the Act and its implementing regulations. As discussed above, any such placement must follow from and be based on the I.E.P. See also 34 C.F.R. Pt. 300, App. C, Question 42, at 84 (1986). This methodology is especially important where, as here, the child's placement is integrally related to the special educational services to be provided. In the design of the Act, these services are selected and molded into a program at the I.E.P. meeting, see 34 C.F.R. §§ 300.343, 300.346; a meeting at which the input of the parents is of paramount importance. See Rowley, supra,

458 U.S. at 205; 34 C.F.R. §300.345. By first determining to place Jonathon at Virginia Randolph, an institution that does not provide educational services except during the day, Henrico impermissably diminished the significance of the I.E.P. meeting at which the educational needs of the child were assessed.

Conclusion

Because the defendants violated the procedures governing the determination of Jonathon's placement, the decision to place him in the day program at Virginia Randolph is invalid. Consequently, Jonathon will be permitted to remain at Melmark at Henrico's expense until such time, if any, as his placement is properly changed or his eligibility for benefits expires.

An appropriate order shall issue.

[signed]

UNITED STATES DISTRICT JUDGE

Date 23 JAN 1987

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1 The Court does feel compelled, however, to make one observation about the placement of handicapped children generally. From the briefs and other papers filed with the Court, it appears that Henrico is of the view that all children may be given an appropriate education based on a daily educational program. This position, however, conflicts with the Act and its implementing regulations. Federal law clearly contemplates that some children must be provided a residential placement to receive the educational benefits envisioned by Congress. See Abrahamson v. Hershman, 701 F.2d 223, 227 (1st Cir. 1983); Gladys J. v. Pearland Independent School Dist., 520 F.Supp. 869, 875 (S.D. Texas 1981).

2 The defendants correctly note that under 34 C.F.R. §300.504 Henrico was required to give notice to the parents regarding a proposed change in placement. The defendants contend that, because under some circumstances the placement decision may be made at the time of the I.E.P. meeting, the notice of the

2 (cont'd) proposed change in placement was provided to permit the placement decision to be made at the I.E.P. meeting itself and thus to obviate a subsequent meeting solely to determine Jonathon's placement. See 34 C.F.R. Pt. 300, App. C, Question 7, at 76 (1986). Nothing in either of the above cited references, however, conflicts with the conclusion reached here. Even assuming that a decision to change placement (as distinguished from making the original placement or maintaining the current placement) may be made in conjunction with developing the annual I.E.P., the Court finds that in this case the placement decision preceded the I.E.P. meeting. Additionally, contrary to the defendants' view, it is reasonable for the regulatory scheme to entail a notice and a "placement" meeting after the I.E.P. is developed and before a change in placement is made.

VIRGINIA DEPARTMENT OF EDUCATION

DIVISION OF SPECIAL EDUCATION AND SUPPORT SERVICES

REVIEWING OFFICER'S REPORT

IN RE: JONATHAN SPIELBERG - HENRICO COUNTY PUBLIC SCHOOLS

I. STATEMENT OF CASE

This case comes for review on the appeal of Henrico County Public Schools (HCPS), and the cross-appeal of the parents of Jonathan Spielberg (Jonathan), from the decision of William L. Lewis, presiding Hearing Officer.

This Reviewing Officer was assigned to review this matter by letter dated March 11, 1986 from Kenneth Beachum, Associate Director, Administrative Review Service, Virginia State Department of Education. Mr. and Mrs. Spielberg were represented throughout the review by Mr. Thomas F. Guernsey and Henrico County Schools was represented by Mr. J. T.

Tokarz. Counsel for the parties were likewise advised of the Reviewing Officer's appointment by letter from Mr. Beachum dated March 11, 1986 and by letter from the Reviewing Officer.

Shortly after the Reviewing Officer's appointment, Henrico County Public Schools provided the Reviewing Officer with a typed transcript of the hearing, 921 pages in length, and with the exhibits and memorandum of the hearing. In response to requests for a continuance from each party for opportunity to review the transcript and submit additional briefs and written argument, the parties were granted until April 1, 1986 to submit original briefs and until April 11, 1986 to submit rebuttal briefs. As the original due date for the Reviewing Officer's report was April 9, 1986, the due date for the decision was extended at

this time to April 18, 1986. Each party submitted an original brief and a reply brief was submitted by counsel for the parents, Henrico County electing not to submit a rebuttal brief.

Because of the length of the transcript and documentary evidence, a second continuance on one week was granted upon the request of counsel for HCPS the Reviewing Officer additional time to prepare his opinion. This opinion is now being rendered within the time limits prescribed by law, as continued upon the written request of the parties, as provided by the Regulations.

II. FINDINGS OF FACT

Jonathan Spielberg, age 17 years, is a severely and profoundly handicapped child who is both severely and profoundly mentally retarded and autistic, as these terms are defined in the "Regulations

Governing Special Education Programs for Handicapped Children and Youth in Virginia" (State Regulations). The Hearing Officer has summarized Jonathan's condition and particular limitations as a severely and profoundly handicapped child on pages 3 through 7 of his report, and the Reviewing Officer accepts this summary of the evidence concerning Jonathan's condition as an accurate statement of the facts.

As a handicapped child within the meaning of the Education for All Handicapped Children Act of 1975, as amended, 20 U.S.C. §1400 et seq (the Act), Virginia Code §22.213, and the State Regulations, he is entitled to a "free appropriate public education" in the "least restrictive environment". Jonathan has been enrolled in residential, 24 hour a day, educational

programs since 1973, and has been enrolled at Melmark in Berwyn, Pennsylvania, with LEA funding, since 1977. An IEP has been developed for Jonathan each year since he was enrolled in the school, including the present school year.

Jonathan's severe handicaps limit the level of education that he will be able to attain. As described by the witnesses, Jonathan will probably never be able to acquire or perform meaningful vocational, job-related, skills, and his educational focus is on self-help skills designed to make the roles of his caretakers somewhat easier. These skills relate to such tasks as toileting, dressing, eating, mobility, and leisure skills. At all times Jonathan requires one to one constant prompting and supervision for the performance of all

tasks. He is unable to self-initiate and depends on others for hygiene, eating and protection. Jonathan is unaware of danger and is not able to learn from prior experiences what may be dangerous to him. He is also unable to generalize skills that he has acquired, so a change in the place where such skills are to be performed, or a change in the routine in which they are to be used, makes the performance of such skills by Jonathan in the new location or context unlikely.

The Hearing Officer has correctly concluded that despite Jonathan's low levels of functioning, there has been progress made with this child, in the above-described areas. The evidence was clear that Jonathan's ability to control his running and rumination behavior had increased, as well as his ability to assist in dressing and undressing, and in

eating. The parties are in substantial agreement that Jonathan's intellectual capacity to learn, as distinguished from his ability to acquire skills, has peaked, but they also agree that some continued progress in Jonathan's acquisition of skills can be expected. Whether past progress is attributable to his educational program, or other factors, is disputed.

HCPS proposes a nine month, six hour per day, five days per week program for Jonathan with six weeks of summer school providing four hours of instruction per day for four days a week and home instruction to assist the parents in Jonathan's after-school care. They propose that this program be implemented at Virginia Randolph, a "state of the art" day school program, with community services and in-home care also being

provided. The Spielbergs insist that Jonathan requires a residential program to obtain educational benefit.

The Hearing Officer carefully reviewed the current IEP that was developed between the parties and made certain amendments to that IEP. The parents had raised a number of concerns about the IEP as questions of violations of their procedural rights under the Act. The Hearing Officer addressed most of these concerns on pages 11 and 12 of his decision. Since these concerns have not been raised on this appeal, the Reviewing Officer agrees with the Hearing Officer's findings of fact concerning these matters and affirms these changes to the IEP.

The Reviewing Officer finds that before the drafting of the current IEP, HCPS had strongly considered the possibility of changing Jonathan's

placement from the residential placement at Melmark to a day placement, and that Virginia Randolph had been considered as an appropriate placement. The Hearing Officer found, as a matter of fact, that although the LEA may have wanted to act upon the specific day placement of Virginia Randolph, both prior to and during the drafting of the IEP, the school never voted that Virginia Randolph was the placement for this child. The evidence also shows that bringing the child back prior to the development of the IEP was certainly considered by the school, but no decision to take this action was finally made, and certainly such a decision was not implemented. A withdrawal of funding for the residential program was threatened. The Reviewing Officer finds an important fact in this context is that Henrico County, and not

the parents, finally had to request the due process hearing to determine the appropriateness of the proposed program and placement for Jonathan Spielberg.

III. ISSUES

The issues on this appeal relate to the substantive question of whether or not Jonathan Spielberg requires a residential placement and the procedural question of whether or not HCPS violated the rights of Jonathan and his parents in considering a particular placement, or a change of placement before the prior development of an IEP.

IV. HEARING OFFICER'S DECISION

The Hearing Officer ruled that the IEP developed for Jonathan Spielberg, as modified by his decision, was appropriate as to its statement of Goals and Short-Term Objectives. He further concluded that the HCPS proposed day program with

six weeks summer school and the use of a home trainer was not appropriate to meet Jonathan's educational needs. The Hearing Officer held that the parents were not denied any procedural rights concerning placement decisions made by HCPS about Jonathan.

V. CONCLUSIONS AND RATIONALE

The question of responsibililty of a local educational agency for a residential placement has had a developing case history in the period of time that Pub. L. 94-142 has been in effect. The courts have centered their decision around the following language of the Regulations:

> If a placement in a public or private residential program is necessary to provide special education or related services to a handicapped child, the program including non-medical care and room and board, must be at no cost to the parents of the child. (34 CFR 300.302)

> An LEA shall consider placement of a handicapped child in a private nonsectarian program only after it has been determined that the LEA is unable to provide free appropriate special education for a handicapped child, either locally or through arrangement with other LEAs, and such program is not appropriately available in state schools or institutions. (Va. Reg. III. B(9)(b)).

The regulations impose on the LEA responsibility only for educational placements, only those placements necessary for educational reasons. On the basis of this requirement, LEA's and the courts have distinguished educational from non-educational placements in deciding who bears the responsibility for the high cost of residential placements.

The courts have found residential placements necessary for diverse educational reasons. These have included self-help skills, need for a 24-hour structured environment to permit low-functioning students to learn, and an

inability to find any appropriate non-residential alternatives. (See Matthews v. Campbell, EHLR 551:264 (E.D. Va. 1979), Wallingford Board of Education v. State Board of Education, EHLR 552:305, and Cox v. Brown, 498 F. Supp. 823 (D.D.C. 1980). These decisions make it clear that education is not limited to the acquisition of academic and vocational skills, but include self-help and other basic skill areas.

In fact, a broad definition of education has made it difficult at times for the courts to separate educational and non-educational needs in assigning responsibility for residential placements. An early example of this difficulty is found in North v. District of Columbia Board of Education, 471 F. Supp. 136 (D.D.C. 1979). In that case, the Court ruled:

> It may be possible in some situations to ascertain and determine whether the social, emotional, medical or educational problems are dominant and to assign responsibility for placement and treatment to the agency operating in the area of that problem. In this case, all of these needs are so intricately intertwined that realistically it is not possible for the Court to perform the Solomon-like task of separating them.

In later decisions, the courts have indeed found it possible to determine whether educational or non-educational factors necessitated residential placement. In Kruelle v. New Castle County School District, 642 2d 687 (3d Cir. 1981), the Court asked whether or not residential placement was required for Paul Kruelle to learn. Here the Court directly connected residential placement and the learning process. Yet the Kruelle court failed to consider the non-educational factors that could also detrimentally effect the learning process and require residential placement, such

as medical problems and home conditions. It is this distinction that the law requires.

An analysis of the progression of case-law in this area, and suggestion for a comprehensive approach is contained in an article by Thomas A. Mooney and Lorraine M. Aronson entitled, "Solomon Revisited: Separating Educational and Other Than Educational Needs in Special Education Residential Placements" (14 Conn. L. Rev. 531 et seq.). The authors there suggest that in each case the courts, and by inference, hearing officers, must determine the reason for a particular placement and whether or not that reason is educational or non-educational. They conclude,

> If a child could receive a free appropriate public education in a local or day program but for the existence of other than educational needs, residential placement is not educational in nature. School

districts cannot be asked to divert scarce funds to meet responsibilities that properly lie elsewhere.

The Hearing Officer focused attention on the requirements under the landmark Supreme Court decision in Hendrick Hudson Board of Educ. v. Rowley, 73 L.Ed. 2d 690 (1982) and the substantive standard established by the Court for special education. Pursuant to that decision, special education, to be appropriate, must be designed "to confer some educational benefit upon the handicapped child," realizing the unique needs of each child. Consequently, a Hearing Officer or Court must decide not only whether or not services are educational or non-educational in nature, but also that a given program is designed to confer educational benefit.

In the case of a severely and profoundly handicapped child, the

Regulations anticipate that services for such a child may "require significantly more educational resources than are provided for the mildly and moderately handicapped in special education programs." However, in the case of Matthews v. Davis, 742 F.2d 825 (4th Cir. 1984), the Court approved the termination of residential services to such a severely and profoundly handicapped child because it found that the child had reached a point of diminishing marginal returns and would be unable to learn much more. Id. at 830 (emphasis added). This would indicate that analysis of a program's design to confer educational benefit, must also include careful analysis of the child to be subjected to that program, and particularly in cases involving severely and profoundly

handicapped children, there may need to be an analysis of "educability."

HCPS, by Counsel, has argued that the requirement of least restrictive environment also imposes upon the decision-maker the task of considering the cost of the educational services to be provided, along with the nature and extent of the gains to be expected with any given educational program, in determining an "appropriate" education. (See Bales v. Clark, 523 F.Supp. 1366 (E.D.Va. 1981)). A number of decisions have considered the issue of cost in determining appropriate services, but the majority of decisions, and in the opinion of this Reviewing Officer the best rule, is that cost should only be considered when one is choosing between several appropriate options. (See Clevenger v. Oak Ridge, 774 F.2d 514 (6th Cir. 1984).

Analyzing the facts of this case in light of the case law, the Reviewing Officer finds that in spite of the fact that the parent's expert witnesses all testified that Jonathan required consistent structure twenty four hours per day, and that a residential program was best for him, the Reviewing Officer is unable to conclude that he receives such structure in his present residential placement, or that his residential placement is, in fact, necessitated for educational reasons. The parents' special education expert Dr. Manfredini, wrote:

> Conversation with a child care worker who has worked with Jonathan for 11 months (average worker stay being 2 months with Jonathan's group) yielded the following information: Jonathan goes from school to a recreational activity, eats supper, has another recreational activity, returns to the unit around 7:00 p.m., bathes, has quiet play time and is in bed between 8:00-8:30 p.m..... The residential worker reported there is minimal

> carryover of the classroom program and no formal system for monitoring implementation of programs on the unit.
>
> Jonathan seeks structure and appears to function best in those environments which provide consistent, obvious, predictable structure, limits and expectations. His current educational program has several deficits: an inordinate amount of down/dead time, non-functional activities and inconsistent carryover to the living environment. (Exhibit, 172 (emphasis added).

In fact, the Hearing Officer did find that:

> Most of the witnesses who testified at the hearing and most of the documents which were introduced as exhibits on the topic of Melmark are frank in their criticism of the inconsistencies, dead time and "custodial" (emphasis added) nature of the present residential placement of the child.
>
> However, the Hearing Officer

concluded the burden of proof being on HCPS to show the appropriateness of its proposed placement, information about Melmark as an improper residential

placement was not relevant to the issue, and accordingly held for the parents.

The Reviewing Officer finds this unacceptable. As Counsel for HCPS has correctly pointed out, this case can only be considered on the basis of the facts presented. Those facts reveal that in his current placement, Jonathan's after-school care is primarily custodial, and not educational, in nature. This fact effectively rebuts the parents contention that Jonathan requires residential care for educational reasons, as he has made educational progress at Melmark although he has not received the consistency and structure there that the parents and the parents experts contend he must have to progress. There is no reason to believe that Jonathan's parents could not provide the same level of services to Jonathan that he has received at Melmark during

after-school hours. This is what HCPS proposes to do.

The Hearing Officer found that Virginia Randolph is a "state of the art" special education program for severely and profoundly handicapped children. Jonathan's after-school care requires primarily custodial, and not educational, services which the Reviewing Officer finds can be adequately provided by the parents with training and in-home services provided by the LEA.

The IEP for Jonathan was designed to confer educational benefits upon him and has been worked out by the parties with careful attention to every detail. His placement at Virginia Randolph poses a potential for some regression. However, any change in Jonathan's routine or placement poses the same threat. It is hoped that Jonathan will be able to

reacquire any skills that may be lost with such a change in placement. This Reviewing Officer cannot accept the argument that Jonathan must be continued at Melmark, for educational reasons, because of the threat that removal from Melmark will cause regression in the form of loss of skills, which Jonathan may never be able to recapture. Any change in his living environment or regimen poses the same threat for Jonathan, and the Reviewing Officer cannot contemplate that it is seriously being proposed that Jonathan is going to spend the remainder of his life in this placement. Certainly this line of reasoning cannot be sustained on educational grounds. The requirement of least restrictive environment anticipates community placements, if at all possible. The evidence fails to show that Jonathan

cannot be successfully placed at Virginia Randolph in line with HCPS' proposed IEP.

As counsel for HCPS has argued, the parents experts all testified that a 24 hour, residential placement with consistent structure and supervision would be the best for Jonathan. Parents counsel argues that these experts intended to say that such a placement and program was simply necessary for Jonathan to receive educational benefits. The Reviewing Officer finds that the facts do not support the argument of parents counsel, and the law does not require optimization of education for a handicapped child. (See Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982).

Finally, the Reviewing Officer agrees with the Hearing Officer that there were no substantive procedural violations of

parents rights in the formation of the IEP and the proposal of the placement at Virginia Randolph. Although there may have been technical violations of the law in this regard, in as much as an IEP is to be completed before placement decisions are made by an LEA, such were not significant and prejudicial violations of procedure that seriously compromised the provision of a free appropriate public education to Jonathan Spielberg, and the conclusions of the Hearing Officer are affirmed by the Reviewing Officer in this regard.

The decision of the Hearing Officer is therefore affirmed in part and reversed in part. This decision is final unless either party appeals to the appropriate Court. In compliance with Chapter 5 of the Virginia Regulations, the Reviewing Officer further states:

1. He has examined the entire hearing record.
2. He is fully satisfied that the procedures at the hearing before the Hearing Officer were consistent with the requirements of due process.
3. He has determined that no additional evidence was necessary.
4. All parties were represented by counsel throughout the hearing.
5. This written report contains his decision upon completion of the review.
6. He certifies that on the 26th day of April, 1986, he mailed a copy of his decision to the parties or their counsel, to the State Department of Education, and to the Hearing Officer.

DATED: April 26, 1986

[signed]

Robert B. Easterling
Reviewing Officer

VIRGINIA DEPARTMENT OF EDUCATION
Division of Special Education and Support Services

POST-HEARING REPORT

Formal Due Process Hearing

School Division: Henrico County Public Schools

Parents: Mr. and Mrs. Howard Spielberg

Division Superintendent: William C. Bosher, Jr.

Name of Child: Jonathan Spielberg

Hearing Officer: William L. Lewis

Hearing Initiated by: Henrico County Public Schools

Post-Hearing Decision

THIS MATTER matured for a formal due process hearing on February 6, 1986 in the School Board Offices of the County of Henrico in Sandston, Virginia. Testimony was received on February 6 and 7 and written arguments were filed by the parties on February 14, 1986. The administrative deadline within which to render a decision in this matter was extended by order dated February 24,

1986. This decision is made within the extended administrative deadline.

The Local Educational Agency, Henrico County School Board (hereinafter LEA), was represented by J. T. Tokarz. The parents and child were represented by Thomas F. Guernsey. The child did not attend the hearing.

Witnesses testifying on behalf of the LEA were: Jo Ann Marchant (Principal, Virginia Randolph Special Education Center), Morton Bradman (Asst. Superintendent for Instructional Support Services), Pat Martin (P.M.R. Teacher, Virginia Randolph) and Joseph M. Mayfield (School Psychologist, LEA). Witnesses testifying on behalf of the child were: Susan Spielberg (Mother), Samuel H. Tucker, M.D. (Neurologist), Dianne Manfredini (Special Educational Psychologist), Edna F. Roth (Ph.D.,

Professor of Social Work, V.C.U.), E. Wayne Sloop (Clinical Psychologist), Robert Christopher Kissel (Behavioral Psychologist) and Howard Spielberg (Father). In an effort to reduce the number of exhibits to be introduced, the parties submitted joint exhibits. After overruling objections from each party concerning specific documents, 177 exhibits and 8 vitae were submitted.

ISSUES

At the conclusion of the Pre-Hearing Conference held on December 16, 1985, the attorneys were directed to submit at the beginning of the hearing written statements of the issues to be raised. The statements were prepared and submitted at the hearing along with evidence in support of the positions of

the parties; however, the issues can best be re-stated as follows:

1. Are the goals and objectives set forth in the Henrico County Public School's proposed Individualized Educational Program appropriate for the child?

2. Does a proposed placement of the child in a public, day program for nine months and for six weeks, four days per week, in Summer, together with the availability of a home trainer, provide an appropriate education for the child?

3. Did the making of a placement decision prior to the parents' acceptance of the Individualized Educational Program for the child violate the procedural rights of the child and his parents?

POSITIONS OF THE PARTIES

LEA Position - The LEA maintains that the IEP which has been developed for the child is reasonably calculated to enable him to receive educational benefit in the least restrictive environment. A residential placement for the child constitutes an attempt to "maximize" the potential educational benefit for the child; thus, the residential placement would impose a substantive standard beyond P.L. 94-142. The LEA has no obligation to fund a residential placement of the child for what it perceives to be non-educational reasons such as after-school supervision, custodial care and parental convenience. It further argues that procedural violations, if any, do not justify the continuation of the child in an

inappropriate placement in an environment which is not the least restrictive.

Parents Position - The parents argue that the goals and objectives contained in the proposed IEP for the child are not appropriate for him and that the proposed placement in a nine month, six hour per day academic year program with a six weeks summer school of four hours per day, four days per week is not reasonably calculated to enable the child to receive educational benefit. Furthermore, they argue that his educational, psychological and medical needs are so interrelated that it is impossible to segregate the educational need. They maintain that the LEA has violated P.L. 94-142 and the supporting regulations in which a placement decision can be made only after the completion of an IEP for the child. The placement decision was made by the

LEA prior to IEP completion; consequently, the LEA has violated the procedural rights of the child and his parents.

FINDING OF FACT

Based upon the exhibits and testimony received, it is found that:

1. Jonathan Spielberg, born August 23, 1968, reflects a complex combination of low intellectual ability, inadequate social skills and higher splintered motor abilities. He has been diagnosed recently as follows:

> This child is suffering from a non progressive organic encephalopathy associated with profound mental retardation (functional mental ability is less than a 18 month level, with a number of specific developmental levels considerably less than this, in particularly communication, and with a few somewhat more advanced splinter skills). Additionally, he is

> showing a picture of an atypical pervasive developmental disorder.... The cause of this is... certainly neurologically based.... (Tucker, Exhibit 173)

The autistic characteristics which the child exhibits include unusual reactions to objects in his environment, inability to interact, associate with or maintain eye contact with people, inability to communicate verbally by spoken words or, for the most part, even with gestures. He has never cried and seldom laughs appropriately as a result of external stimuli. Recent testing indicates that his infant mental ability measure confirmed consistently produced scores of approximately nine months over many years. His social maturity testing produces a score of 1.65 years of age. His I.Q. scores have remained below 20.

Besides his profoundly depressed I.Q., major obstacles to this child's ability to learn on a higher cognitive

level are seen in several factors. First, having no internal mechanism to self-initiate purposefully, the child is dependent upon his environment to provide external stimuli to initiate most of his actions. Stimuli can be in the form of of physical or verbal prompts, conditions of the environment, or even actions of others in the same environment. Without the external stimuli the child will become inactive and withdrawn from contact with his surroundings. He is what is known as "stimulus bound". (Anderson Clinic, Exhibit 29)

Second, His extremely low cognitive abilities place him at what is known as a "preconceptual level" (Hoffman, Exhibit 161). Even though this extremely low developmental level is not particularly instructive as far as all functioning levels are concerned (because his

development is atypical), a child with a preconceptual level has difficulty responding to spoken language alone. The child responds better and more consistently when the spoken language is accompanied with very simple gestures.

Third, the child has no ability to "generalize" his experiences from one environment to another; consequently, those skills which are learned within one environment are not easily transferred to other environments - even those in his regular routine. This inability to "generalize" is often found occurring in children with profound mental retardation and autistic children.

It is difficult to set forth in a Findings of Fact all of the Characteristics (strengths and weaknesses) of this extremely unusual ("atypical") child for each of his

weaknesses would be sufficient to trigger the utilization of special educational services in any jurisdiction; nevertheless, it is important in understanding the child that many of the these factors at least be identified:

(a) Attention span - The child has a very short, almost nonexistent, ability to stay on task without continuous gestural or physical prompting. He is extremely hyperactive and requires constant supervision to stay on task. Although there is conflicting evidence as to the actual length of time which this child can spend on a particular task without intervention, it is clear that the attention span does not exceed 60 seconds. With close supervision and possible physical restraints (use of barriers, hand-holding etc.) he has been observed to maintain some form of

assisted attention for as long as 20 minutes while seated in front of a television.

(b) Positive reinforcers - The child exhibits no sense of preference for particular items or for activities which can be used a means to positively reinforcing acceptable or desired behaviors. Because there is a lack of preference, the typical uses of positive reinforcement in educating this child are and will continue to be difficult to administer effectively. In light of the repeated references to this deficiency, the instantaneous success which Dr. Bradman had with this child is viewed as an isolated incident unlikely to reoccur consistently.

(c) Social interaction - The child almost constantly attempts to cover his ears with his hands and, if one is

physically placed at his side or in his lap, the child rotates his head so that his uncovered ear can be placed flatly upon his shoulder. The consistency of his attempts to cover his ears with his hands dramatically interferes with the ability to acquire any fine motor or even upper extremity skills. Furthermore, the refusal to socially interact with adults and peers is regularly demonstrated by his attempts to withdraw from a group and typically stare out of a window for indeterminate amounts of time. Nevertheless, there has been improvement in this area, particularly with adults.

(d) Language capabilities - The receptive language capabilities of the child are very low. He can understand a few rote phrases ("give me", "stand up", etc.) but does not show emerging abilities to conceptualize objects

through solely verbal communication. The child has even more limited expressive communication abilities. They consist of no verbal skills and, at best, simple gestural skills for three to five simple words. Beyond "cracker", "eat", and "more" there is no indication that the child understands expressive language.

(e) Cause and effect - The extremely limited cognitive abilities of the child prevent the utilization of any educational form of cause and effect learning patterns. Furthermore, the lack of any understanding of cause and effect places the child in dangerous situations in which he has no understanding either before or afterwards that the consequences are directly related to the conditions of his environment or to his actions in it. As a result the child has no fear of traffic, has no sense of

danger from stoves, etc. So severe is the deficiency that the habit or reflex of placing his hands on ears (discussed in paragraph (c) above) is a good example of what can and does happen: the child has been observed to fall while walking with his hands on his ears; there having been no internal stimulus to cause him to remove his hands and to break the fall, the child landed face first on the ground and injured his face, but he made no association between the fall and the injury to his face.

(f) Toileting - The child has not learned to be toilet trained. At best, he can be described as "toilet-timed" - that is, it is the responsibility of the staff to insure that the child is taken to the toilet on a regular basis. Diapers are used at night and, during the day, accidents are not unusual. Because

he has no internal sensors that warn him when the need to eliminate arises, he has not learned to gesture the need to use the toilet. All of the parties have confidence that he can be toilet-trained - I have serious doubts.

(g) Running - Unless the child is placed in an environment which has physical barriers (locked doors inside or hand held by staff outside), the child will attempt to run away without direction. Although it is difficult to locate the actual cause of his activity, it is suspected that it occurs as a result of external stimuli and, in particular, from his realization that there are larger open spaces into which he can run. Because of the extremely low cause and effect reasoning which the child has, the running activity places

him at any moment in time in jeopardy from a dangerous situation.

2. The extremely low intellectual capabilities of the child will limit the level of education which the child will be able to attain. Foremost among educational objectives for the child is development of selfhelp skills. At the present the child can partially dress with prompting for each item of clothing, can partially undress and can perform some eating functions; however, no basic living skill, whether it can be eating, dressing, playing, washing, or grooming, can be undertaken, conducted or completed without one to one constant prompting or communication through gestures. The child is totally dependent upon staff for all personal hygiene. He cannot button, snap, hook or zip any of his clothes. His eating must be controlled by staff

piece by piece because of his tendency to "bolt" large quantities of food at once and then regurgitate his food. Any other skills which require fine motor skills simply cannot be performed independently.

3. In spite of these extremely depressed and delayed levels of ability and functioning, there has been progress made with this child. While testings over the last ten years indicate that his I.Q., social age and mental ability levels have remained relatively constant (below an I.Q. level of 20), the progress reports, other exhibits and testimony indicate a slow, but positive pattern of improvements (discussed later) throughout the years. Those improvements, especially recent ones, cannot be attributed cavalierly to maturation, alone - certainly, intensively structured

education has had the greatest influence upon the progress.

Experts at The John F. Kennedy Institute, Baltimore, Maryland, recently determined that Jonathan may have "peaked" intellectually - that is, Jonathan may continue to learn new skills at the same cognitive level at which he now performs, but he will not reach a higher level of learning. Dr. Tucker, a pediatric neurologist, confirmed this opinion.

Although not inconsistent, the IEPs individually presented by the LEA (Exhibit 143) and by the parents (Exhibit 109) set out goals and objectives which ostensibly are reasonably calculated to provide educational benefit to the child. These goals and objectives are detailed and numerous. It is clear that the parties believe Jonathan can continue to

learn more than a marginal amount of skills and this Hearing Officer finds Jonathan able to learn in the future.

Nevertheless, there have been positive steps for this child in areas that have been identified appropriately as annual goals for him. The documents indicate that there has been significant progress in his ability to show self-control in areas of impulsive running and rumination, he has begun to show some indication of purposeful exploration of his environment, and he has shown a slight desire to be more socially responsive and interactive with adults and some peers. Although his self-help skills have not made dramatic improvements since his admission in 1977 to the present residential placement, Melmark School, there has been enough progress towards acquiring self-help

skills (in such things as hand washing, dressing, reduced wandering and running and increased social responsiveness) that it concluded that he is receiving educational benefits. Although LEA testimony pointed to the existence of not progress, but regression, when the child was transferred from Howell's Childcare to Melmark, the baseline data upon which the determination of regression was made was drawn from glowing progress reports submitted by Howell's. This Hearing Officer does not accept the Howell reports as being valid baseline data; consequently, it is found the child has not experienced regression (or loss) at Melmark.

4. Jonathan was enrolled in Howell's Childcare, Inc. in North Carolina in November, 1973. He remained at the residential school on a twelve months

basis until 1977. At that time his parents became dissatisfied with the amount of contact which they were being allowed to have with their child and became suspicious that the progress reports sent by the school were inaccurate. In particular, the parents noted a distinct difference between the levels of skills which were described in those reports and the functioning level which they were able to observe personally. As a result of this dissatisfaction and after months of searching, the parents enrolled the child in Melmark in Berwyn, Pennsylvania.

The child has remained at Melmark with funding from the LEA. An IEP for this child has been developed by Melmark each year since initially enrolling in the school. In compliance with the special education regulations dealing

with residential placements of handicapped children, the LEA was asked specifically by Melmark to participate in the IEP committee meetings or to submit comments if it was unable to send a representative to each annual meeting. Although the record indicates that the staff of the LEA and members of the evaluation teams repeatedly noted to each other apparent inadequacies of data-based programs and inconsistencies of school/residential coordination to eliminate running and mouthing of objects and to encourage the acquisition of basic skills, the only participation which the LEA has made in the development of the many Melmark IEPs has taken place in those years in which the LEA has made a concerted effort to lay the groundwork for a possible change in placement. Even with the continuous comments about the

inadequacies of Melmark and the occasional LEA input into the Melmark IEP process, the LEA has consistently approved the IEPs proposed by Melmark since 1977. Even in light of the severe criticisms made by the educational team sent by the LEA to Melmark in August, 1984, the LEA approved the 36 page Melmark IEP, dated May 6, 1985 and subsequently approved tuition grants to January 31, 1986.

After adequate notice to Melmark and to the parents, the LEA attempted to develop an IEP for the child in October and early November, 1985. A transcript of the November 4, 1985 IEP meeting was prepared (Exhibit 144). At the conclusion of the meeting there appeared to be little disagreement between the LEA and Melmark concerning the IEP in its amended form, but because the conference

was held by telephone with Melmark, logistical problems required that the IEP be typed in final form and mailed to Melmark for its review and further comments. Although promised to be returned within approximately one week of the November 4 meeting, comments from Melmark were not prepared and sent until November 20, 1985. (Exhibit 149). Those comments are not found to be significant in terms of the question of appropriateness of annual goals and short-term objectives. Primarily, Melmark was concerned with overly optimistic criteria of "100% accuracy" on many objectives, lack of "delineation of the conditions under which behaviors were to be performed", and staff inefficiency of required data collection for the many objectives proposed in the IEP.

While this Hearing Officer is reluctant to undertake the rewriting of an entire IEP, the specific objectives which have been raised by Melmark and by the parents (discussed later) should be addressed. Taking the Melmark comments first, the response made by Counsel for the LEA in its letter dated December 16, 1985 (Exhibit 164) sufficiently addresses those questions; consistently, the comments made by Melmark have been considered by this Hearing Officer and are rejected.

On December 2, 1985, the parents, by counsel, expressed their concerns for the proposed IEP (Exhibit 152). Those objections were as follows:

a) Ambiguitites in terminology.

b) Errors in recording what was agreed to in the IEP meeting.

c) Additional material which was not discussed at the IEP meeting.

d) Clarifications/additions of the Spielbergs.

e) Differences in whether a particular objective, criterion or related service is appropriate.

f) Absence of a segment of the IEP.

g) Inappropriateness of deciding placement before completing the IEP.

(Exhibit 152). Those objections will be addressed in the order in which they are set forth above:

a) Ambiguities - Clarifications have been made in the LEA letter, dated December 16, 1985 (Exhibit 164). Redrafting by this Hearing Officer is not necessary. Reference to the LEA letter is made for clarification of terminology.

b) Errors in recording - Although the IEP should reflect the agreement by the parties that Jonathan "continues running behavior" and should include a statement that he does not have "generalized learning skills in all environments", the transcript of the second IEP meeting does not reflect an agreement to place the language "All objectives in Activities of Daily Living will be carried out in all environments using same strategies." (Emphasis added). The emphasized words were not agreed upon as an appropriate explanatory note for numbered pages 1-7 of the IEP dealing with "Activities of Daily Living" (Self-help Skills, Eating/Meal, Toileting, Mobility and Domestic Skills). Nevertheless, it is found that the LEA agrees with the parents "that Jonathan would benefit from follow-through of his

classroom instruction - that is why after-school training is being offered to assist the parents or caretakers in maintaining a supportive home environment." (Exhibit 164, page 7). Lastly, the wording for the environment in which vocational skills will be addressed (pages 8 and 9 of the IEP) should be changed per agreement of the parties from "activity workshop (sheltered task)" to "simulated workshop".

c) Additional materials - Except for the question of the need for a twelve month program, the matters raised in this portion have either been agreed to by the parties or are not worthy of comment by the Hearing Officer. The twelve months issue is addressed later herein.

d) Clarifications/additions - The LEA staff has agreed with or accepted the

requests for additions and deletions contained in this section. No further comment is warranted.

e) Differences over the appropriateness of different criterion or related services - The LEA has bowed to the requests of the parents concerning many of the proposed changes in the IEP in this category; however, there remains a fundamental disagreement between the parties concerning the nature of after-school training/care. This issue will be dealt with later. On other matters, because the child cannot think beyond a precognitive level, the first three objectives on page 8 of the IEP (Vocational) are inappropriate and should be deleted. Activities requiring lower level skills should be included, but the types of skill activities must be addressed by therapists. With the

exception of "therapeutic horsemanship" which is specifically rejected as being unnecessary, all other requests for additions or deletions under this category have been honored by the LEA. Further action by this Hearing Officer on those matters is not required.

f) Absence of a segment of the IEP - The absence of a statement in the IEP concerning the present levels of educational functioning has been remedied by the LEA and no further discussion is needed on that point either.

g) Inappropriateness of deciding placement will be discussed in Paragraph 5. In addition to attempting to identify annual goals and short-term objectives for the child, the IEP committee undertook to make a determination as to placement. As the transcript reflects

(Exhibit 144), a considerable amount of debate occurred between counsel for the LEA and counsel for the parents as to the legality of making a placement decision for a specific facility or program as opposed to the more general question of residential vs. day programs. It was the contention of the counsel for the parents that procedurally selection of the day program offered by the LEA was inappropriate at that stage. It was the contention of the counsel for LEA that division of the decision-making process into first the general type of program and, second, the specific program in a subsequent meeting (and ultimately in a subsequent hearing) was dilatory and not in contemplation of what the regulations intended. While the parents are correct in arguing that the only decision which could be made at the time of drafting the

IEP was upon the issue of residential versus day programs, the procedural issue raised and argued by counsel during the hearing and in their briefs does not reflect what was actually done at that IEP meeting on November 4, 1985. Even though counsel for the LEA wanted to act upon the specific day placement of Virginia Randolph, the ensuing discussion culminated in a conversation as follows:

> MR. TOKARZ: All right. Well, we will have to disagree. I take a different view of the regs. We will have to disagree and let that be resolved in a different forum. If you want to talk in general about residential versus day program, then --
>
> MS. MARCHANT: I agree that we could readdress that. If you would like to restate your statement about where you feel the goals and objectives on this IEP can be addressed.
>
> MS. WHITING: This is Gwen Whiting again. I feel that the IEP goals could be met in a day program with six weeks summer school with no more than two to three weeks break between and services offered for after-school programming.

MS. MARCHANT: Any disagreement with that?
MR. TOKARZ: From the team?
MS. MARCHANT: Well, from the team looking at them, body language - (Exhibit 144, page 57, lines 6-24)

Nowhere does it indicate in the record that the school actually voted that the Virginia Randolph day program was the placement for this child. While everyone probably knew Virginia Randolph would be the local program ultimately, I find no procedural error was committed in this matter of placement decision-making.

Furthermore, I find that the parents have failed to come forward with adequate evidence to show that earlier in 1985 the school prematurely made the decision to bring the child back. Speculation would obviously indicate that that is what they wished to do if the evidence indicated such a move was appropriate, but as Dr. Bradman and other members testified, no formal decision had been made concerning

placement. Speculation is not sufficient to meet the parent's burden of proof in this issue.

The actions that took place between the parents and the LEA following the IEP meeting on November 4, 1985 can best be characterized as the culmination of a hostile environment. When the LEA threatened to automatically change placement of the child and terminate funding of the residential placement following a month's delay in receiving comments from the parents and Melmark (which were due one week after the IEP meeting), this Hearing Officer views those comments as purely posturing or bluffing in order to force the parents to move towards an acceptable settlement of major differences. It is not likely that the LEA could have realistically expected to be successful in forcing the hand of

Jonathan Spielberg's mother who, incidentally, is the Acting Director of the State Advocacy Department for the Developmentally Disabled for the Commonwealth of Virginia. Mrs. Spielberg is an attorney and she has under her a staff of attorneys who regularly appear in special education cases throughout the state representing parents of handicapped children. As Director, she is no stranger to formal due process hearings. Furthermore, even though counsel conducted themselves during the formal due process proceedings with utmost courtesy and concise preparation of a complicated case, friendly disagreement between these parties had not been the usual circumstance. In fact, complaint was made to the Secretary of Human Resources for the Commonwealth of Virginia concerning the representation of

Mrs. Spielberg by Advocacy Office staff attorneys. Although there was no legal impropriety with the relationship with the Advocacy Office, ultimately Mrs. Spielberg obtained other counsel. Later, similar allegations of impropriety were leveled against counsel for the LEA in attempting to represent individuals employed by the LEA. In light of the heavy-handed tactics used by both sides and in the absence of any specific procedural violation which has not already been addressed it is found that the parents' procedural rights have not been violated in this matter.

6. The LEA has a program at a separate facility called the Virginia Randolph Special Education Center with specific emphasis upon meeting the needs of serious emotionally disturbed, trainable mentally retarded or severely

and profoundly handicapped children. At present of approximately 133 students attending the school, 49 are severely and profoundly handicapped, 15 of those being over the age of 1 years. The severely and profoundly handicapped exhibit characteristics of I.Q.s lower than 20, poor self-help skills, need for prompting, lack of awareness of danger. Some have aggressive tendencies, some have tantrums, some are non-ambulatory. The staff is adequate to meet the needs of the children during the school hours and one person is employed full time to provide to the parents or other caretakers assistance in developing programs for the home. This person is referred to as a "home trainer".

The facilities used by Virginia Randolph (hereinafter VR) consist of a center-based brick school building which

shares a cafeteria with an adjoining vocational center. It utilizes home economics apartments, gardens for physical therapy, and open areas for exercise and leisure activities. In addition, appropriate emphasis is placed upon trying to get the child off of the campus and into the community through the use of facilities in the community such as bowling alleys, stores, parks, gymnasiums and public or private businesses for vocational training. In this environment the VR educational philosophy of "normalization" is approached on three theories:

a) Top-downward planning - This approach with the active participation of the family sets functional goals for the child to reach by age 22 and a program is devised with those long-term goals in mind. This type of approach is a

departure from the traditional and previously accepted "developmental" approach whereby goals were developed purely on the basis of annual or month to month projected growth.

b) Functional planning - The child is taught real tasks in the very environments in which the tasks will have to be performed or in the medium in which the activity normally occurs. For instance, learning to button the shirt when the child dresses, learning to use eating utensils during mealtime, etc. This approach is particularly beneficial to students who have problems generalizing new skills.

c) Community-based instruction - Because many handicapped children such as Jonathan can't generalize the knowledge they acquire in one environment and transfer its application to another

environment where it will be used, community-based instruction places the child within the environments where the particular activity will occur. For example, if an objective is to have a child learn how to buy an item at the store, the LEA contacts the parents weekly and asks for one or two simple items which are needed at home and the child purchases the items during community based activities.

d) Transdisciplinary - This approach calls for the crossing over of specialists from one environment into another and rejects the traditional theory that the individual specialist (occupational therapist, physical therapist, speech therapist) should provide therapy within an isolated area at designated portions of the day. In the transdisciplinary approach the

specialists either interact with the children within the classroom and at other times which provide functional relevance to the child or they provide consultation to the classroom teachers and aides to assist those individuals providing the therapy throughout the day during appropriate activities.

VR utilizes acceptable and appropriate behavior management techniques for the children attending the school. It directs those behavior management techniques to children who exhibit running impulses, aggression, self-abuse and many other unacceptable activities. The success of the techniques is recorded in data-base for systematic analysis of conditions and remedies. During school hours VR offers all of the appropriate educational and related services to establish itself as a

school reflecting "state of the art" and is found to be an excellent program for what it purports to be - a day program.

Nevertheless, the provisions for a "home trainer" for the parents do not raise the day program to the level of a structured residential environment. The availability of the "home trainer" cannot satisfy the intensive needs of this child as discussed later in these findings of fact. In addition, the services of the one home trainer are already spread among 32 other families who have children participating in the program. The IEP for Jonathan calls for participation by the home trainer with the parents for six hours per day, five days per week. Not only is this of a limited duration, but it also is unrealistic to expect the home trainer to be able to spend adequate time with the parents and child on a long term

basis and still carry the caseload already assigned to her.

7. The child in this matter has many weaknesses which must be addressed by any educational program. These seems to be little disagreement that his strengths and weaknesses, discussed in paragraph 1, do exist. The disagreement is in how to address those conditions and where to address those conditions.

The LEA witnesses generally stated that the child could receive "educational benefit" in a day program that addressed his needs. Services of a home trainer would be provided to the parents to insure that the parents learn the proper techniques for training and maintaining skills. The LEA does not view those services as necessary to the educational success of the IEP; instead the home

trainer is optional to the parents as an assistant in their domestic environment.

Similarly, the LEA has submitted to the parents a list of Community Service Board (CSB) opportunities for the child to participate in after-school care (St. Joseph's Villa), weekend respite care and extended day care (summer camps) during summer breaks from VR. These programs are not controlled by the LEA and are not considered by the LEA to be educationally related services for the child. Uncertainty exists as to the availability of those CSB programs for Jonathan and no commitments for enrollment have been made by these programs or the LEA. No testimony indicated that these CSB programs utilize or attempt to utilize through close cooperation with the LEA any of the behavioral management techniques of which Jonathan would be

familiar from VR. At best, the cooperation involves a bus which travels between VR and St. Joseph's Villa.

8. The witnesses who testified on behalf of the child each found the proposed IEP unable to meet his educational needs. Consistency of training within structured, consistent environments throughout the entire year was a central theme which ran throughout their evidence (Exhibit 169). The multitude of impairments of Jonathan make him unable to generalize any knowledge which is acquired and, if during the process of attempting to acquire a skill, inconsistent techniques or environments are used, loss of acquired skills will occur or failure to attain new skills will result. Only through a structured environment with consistent utilization of well-defined techniques will Jonathan

be able to attain and retain basic educational benefits.

The skills which it is hoped Jonathan will be able to acquire are not the skills that a normal child would be expected to acquire in an academic environment.- His goals involve basic skills for minimum interaction with this environment. They involve skills and subject areas required for bare minimum functioning. His Annual Goals in the IEP are:

a) To continue to improve equilibrim and coordination
b) To structure the environment to increase Jonathan's awareness of dangerous situations
c) To improve vocational skills
d) To improve leisure skills
e) To expand basic communication skills
f) To improve self-feeding and attending skills
g) To improve grooming and attending skills
h) To improve dressing and toileting skills
i) To improve awareness of self and others

j) To increase attending skills/eye hand coordination/fine motor skills
k) To improve understanding of various concepts
l) To improve on-task and attending skills.

(Exhibit 143) Furthermore, his IEP "Skill Areas" are broken down within the general category of "Activities of Daily Living". Within those activities of daily living the subcategories contain basic, functional activities. In the subcategory of "Self-Help Skills" Jonathan's ambitious short-term functional objectives include such items as brushing his hair, wiping his nose, washing his hands, independently buttoning, snapping, or zipping clothing, identifying clothing. On a more fundamental level are such activities as sitting erect, standing erect and responding to simple commands such as "stop," "come here" and "look". Another subcategory of Activities of Daily Living

includes his eating and meal skills. He will be expected to use manual signs to request "eat", "drink", "more", to wipe his mouth and to eat at an appropriate rate (avoiding the regurgitation problem). Under the "Toileting" category, Jonathan will be expected to acquire skills in initiating a manual sign for the need to toilet, to utilize a structured toileting schedule before going to bed and upon arising, to follow a picture schedule for toileting and to change his clothes when there is an accident. Similar basic tasks are found within the category "Domestic Skills" in which Jonathan will be expected to place his clothes and dirty towels in the appropriate places, to independently retrieve food from the refrigerator, pour it and clean up after himself. These activities of daily living do not occur

in the isolated environment of special educational programs located on a school campus. Those activities arise in "daily living" that is, when he arises in the morning, when he eats his breakfast and dinner, when he bathes and when there is a need for toileting. They are skills that are needed throughout the day and night, 24 hours per day, and cannot be contained within a 6 hour period of the day. Most telling is the language contained at the head of each of the activities of daily living; it says: "All objectives in activities of daily living will be carried out in all environments, where appropriate." Certainly, the residential after school component is one such environment where "activities of daily living" occur. Because this child cannot learn in the abstract and cannot generalize skills

from one environment into another and because the skills which this child needs to acquire are directly and predominantly associated with activities beyond a classroom, it is found that the short-term instructional objectives would be meaningless to the Annual Goals if applied only during day program hours.

Furthermore, Jonathan's multitude of deficiencies require that the acquisition of most skills be preceded by months and months (even years) of consistent, calculated training. Virginia Randolph has an excellent staff and utilizes "state of the art" techniques, but Virginia Randolph is only made available to the child for six hours each day. The rest of the day, even the bulk of the day would be turned over to non-professionals (the parents) who must deal with and train Jonathan in a manner consistent

with the professional techniques applied by VR during the school day. It is unreasonable to expect the parents, even with the assistance of a home trainer (a trainer for the parents), to be capable of providing the consistency in training and reinforcement which this child needs during the remainder of his waking hours.

The unique educational needs of Jonathan require that his Annual Goals and Short-term Objectives be addressed in an environment which is consistent from day to day all year long and which is coordinated and operated by professional and paraprofessional staff utilizing consistent techniques throughout the day and night. A day program (as proposed by the LEA) and the IEP does not assume full responsibility for the implementation of a consistent program to be carried out in all environments. Such a responsibility

being required for the IEP, it is found that the IEP and a day program would be inappropriate to implement the Annual Goals and Short-term Objectives of this child, either as originally presented in Exhibit 143 or as amended by previous discussion herein.

9. Most of the witnesses who testified at the hearing and most of the documents which were introduced as exhibits on the topic of Melmark are frank in their criticisms of the inconsistencies, dead time and "custodial" nature of the present residential placement of the child. While the LEA holds up such criticisms as clear evidence that the child does not require a consistent environment, nor consistent training, this Hearing Officer finds such criticisms insufficient to overcome the heavily qualified expert

opinions that this child continues to need consistent, structured environments. In addition, even if Melmark was the issue (which it is not), the proposed day program would not rise to the level of appropriateness just because of inadequacies of a present placement. The issues developed during these proceedings do not directly question the appropriateness of Melmark. In fact, the quality of the educational program at Melmark was only discussed in the text of having a possible educational bearing on the child's progress. Consequently, this Hearing Officer will not make any specific finding as to the quality of the overall program at Melmark or as to the particular program provided to the child at Melmark.

DECISION

Public Law 94-142 and Section 22.1-213 et seq., Code of Virginia, require that the Board of Education and each LEA develop programs designed "to insure that all handicapped children have available to them a free and appropriate education, including special education designed to meet the reasonable education of handicapped children". The child in this matter is certainly a handicapped child. The LEA has recognized its obligation to provide educational services to the child in the least restrictive environment for many years and, in fact, a new IEP was developed for this child in a private residential placement in May, 1985. That IEP is still in effect.

The Regulations require that a child remain in his current educational placement during the pendency of any

dispute over an educational program. Once all of the issues have been resolved concerning an educational program, the LEA can implement change which comply with the resolution of those issues. Nevertheless, the Regulations are not clear as to who must bear the burden of proving that a particular placement is appropriate or inappropriate. Counsel for the parents sets forth in his memorandum of points and authorities the applicable case law which has dealt with this specific issue. At page 6 he argues:

> Citing Tatro v. Texas, 703 F.2d 823 (5th Cir. 1983)(Tatro II), Doe v. Brookline School Committee, 722 F.2d 910 (1st Cir. 1983); Lang v. Braintree School Committee, 545 F.Supp. 1221 (D. Mass. 1982) the court held that "when the suggestion is made that a child, who falls under the aegis of the EAHCA and is currently learning in what has been deemed to be an appropriate setting, be moved to a different facility, the party advocating the move should bear

the burden of proving its propriety." Id. 437.

The LEA is seeking to change the IEP and is seeking to change the placement of the child from residential to day programing. Clearly, the LEA is the movant and must bear the burden of show by a preponderance of the evidence that such changes meet the test of appropriateness articulated by the United Supreme Court. On the other hand, the third issue - violation of procedural due process - was not raised by the LEA, but was raised by the parents; consequently, the parents - movants must show by preponderance of the evidence that their procedural due process rights have been violated.

The first two issues - "appropriateness" of goals/oblectives and "appropriateness" of placement - are controlled by the analysis made by the United States Supreme Court in Board of

Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982). Previous to the decision in Rowley the lack of statutory (P.L. 94-142) and regulatory guidance had caused confusion and inconsistent substantive standards to be applied by the lower courts. In the Rowley case the district court had ruled that the term "appropriate" public education necessitated the offering of services designed to enable a child to achieve her "full potential commensurate with the opportunity provided other children". Rowley, 483 F.Supp. 536 (S.D. NY), Aff'd 632 F.2d 945 (2nd Cir., 1980). In reversing the lower courts, the Supreme Court discarded the "maximization" of potential interpretation; it said:

> Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational

> benefit upon the handicapped child. It would do little good for Congress to spend millions of dollars in providing access to a public education only to have a handicapped child receive no benefit from that education.

Rowley, 458 U.S. at 199, 102 S. Ct. at 3048 (emphasis added). As long as the IEP is "reasonably calculated to enable the child to receive educational benefits", the child has been offered the opportunity for a free, appropriate education. Id. 458 U.S. ____, 102 St. Ct. at 3051.

The first issue - appropriateness of goals and objectives of the IEP - has been addressed in the Findings of Facts portion of this decision. Based upon those findings, the IEP as originally presented at the due process hearing contained goals and objectives which overall were reasonably calculated to provide educational benefit to Jonathan.

Concessions and modifications were made by the LEA in subsequent correspondence (Exhibit 164) and other short-term objectives were deleted by me as unrealistic and, thus, not reasonably calculated to confer education benefit. To the extent that those goals and objectives have been addressed and deleted by me, the goals and objectives on IEP were not appropriate. Nevertheless, it is believed that the modifications made by the LEA by its letter, dated November 16, 1985 (Exhibit 164), and the deletions made by me now make those goals and objectives of the IEP appropriate for the child.

The second issue - appropriateness of a day program for placement - has been addressed by several courts since the Rowley decision. The cases of Abrahamson v. Hershman, 701 F.2d 223 (1st Cir. 1983)

and Matthews v. Davis, 742 F.2d 825 (4th Cir. 1985) involved children so similar in handicaps and needs to those of Jonathan that their decisions are very instructive in analyzing the issues in this case.

In the Abrahamson case the child, Daniel, was approximately eighteen years old at the time the district court addressed his educational needs. The trial court decided the case before the Rowley decision and easily could have applied the more liberal "maximization" of potential approach, but based upon the facts before the court, it found that the "residential case was essential if Daniel was to make any educational progress at all." Abrahamson, 701 F.2d at 227.

On appeal, the First Circuit noted that the test for appropriateness was "educational benefit", not maximization.

It then addressed the question of residential placement:

> It follows from Rowley that the Act does not authorize residential care merely to enhance an otherwise sufficient day program. A handicapped child who would make educational progress in a day program would not be entitled to placement in a residential school merely because the latter would more nearly enable the child to reach his or her full potential. A school committee is required by the Act merely to ensure that the child be placed in a program that provides opportunity for some educational progress.

Id. Nevertheless, the district court decision having so clearly identified the need for 24 hour training and reinforcement as essential for any ("minimal") educational progress, the Court of Appeals found no basis to rule that the lower court findings were clearly erroneous.

In casting aside the argument that the residential care was not an educational need, but rather a

"custodial" one, the First Circuit embraced a statement made by the Third Circuit Court of Appeals: "'the concept of education is necessarily broad with respect to' some severely or profoundly retarded children. Kruelle v. New Castle County School District, 642 F.2d 687, 693). Id. at page 228. When the training that the child needs for minimal progress requires residential continuity and structure, the residential component is an educational service to which the child is entitled. Id. Residential placement of Daniel Abrahamson was affirmed.

The Matthews case involved a boy, age fourteen, who in 1979 exhibited many traits similar to those of Jonathan today: IQs in the profoundly retarded range, mental ages of less than eighteen months, and inabilities to perform even

the most basic of self-help skills (toileting, eating, dressing, etc.). David Matthews also suffered from seizures, grand and petit mal, but these were controlled by medication. (Medical reasons were not the justification for the rulings of the district court.) In contrast, Jonathan has the added factor of an atypical pervasive developmental disorder. The Matthews court ordered the LEA to set up an appropriate residential program for the child in which the child would remain during all after-school hours.

Approximately thirty months later, success was being seen in the residential program, but in light of Rowley the district court consented to hear motions regarding the residential program. The court found at the subsequent hearing that the child had reached the height of

his intellectual capacity to learn; he was at a "point of diminishing marginal return" and probably would learn nothing more. Testimony revealed that the child did not require more than continued reinforcement of already-learned skills through functional applications, and that the drills being utilized in the residential program were not necessary any longer to maintain his learned skills. On the basis that the district court had determined that "the child had done as well as could be expected, and whatever can be done in the home outside of school can be done just as easily by the parents", the residential component was terminated as an "enhancement" of an appropriate day-program. Matthews 742 F.2d at 830 and 831.

Obviously, in 1980 the district court perceived in David Matthews an ability to

continue to learn in the appropriate placement. The later Rowley decision did not fatally turn that initial 1980 placement into an enhancement of an appropriate day-program; instead, the termination of residential services for David was attributable primarily to his inability to continue to learn and the lack of purpose for residential drills. The residential placement in 1980 was not found to be educationally unnecessary for him to receive "educational benefit". The Fourth Circuit Court of Appeals noted:

> The district court's order to establish a residential program for David was entered before the Supreme Court's decision in Rowley. While no issue is now made of its entry, we should comment that the order was entirely consistent with Rowley, for it was necessary for David to receive any benefits of the type sought. Accord, Abrahamson v. Hershman.

Id. at 829.

Just as Daniel Abrahamson and David Matthews once were situated, Jonathan has the ability to continue learning new skills but he requires an environment of such consistency and structure that a residential component must be developed for him if he is expected to receive the educational benefit of the annual goals and objectives of his IEP. This Hearing Officer finds that the reasoning which went into the decision by the Abrahamson court and the decision by the Matthews court in 1980, both residential, apply just as forcefully to the educational placement question posed in this matter. The proposed day-program does not offer an appropriate public education for Jonathan.

The third issue - violations of procedural due process - has been addressed fully in the Findings of Fact.

The parents have failed to develop sufficient facts by which to establish by preponderance of the evidence that there has been a denial of their procedural rights in the placement decision-making process; consequently, no violation of due process is found.

SUMMARY

It is the decision of this Hearing Officer that the Annual Goals and Short-term Objectives, as amended by this Decision, are appropriate to meet his unique educational needs; that the proposed day program with six weeks summer school and use of a home trainer is not appropriate to meet his unique educational needs; and that the parents were not denied any procedure rights concerning placement decisions.

March 5, 1986

[signed]

Hearing Officer

CERTIFICATE OF MAILING

I hereby certify that on this 5th day of March, 1986, I did mail, by postage prepaid, a copy of this Decision to the following:

William C. Bosher, Jr.,
Superintendent of Schools

Mr. and Mrs. Howard L. Spielberg,
Parents

J. T. Tokarz, Esquire, Counsel for
LEA

Thomas F. Guernsey, Esquire, Counsel
for Parents

Dr. Andrew B. Chisick, Department of
Education

[signed]

Hearing Officer

No. 88-1022

Supreme Court, U.S.
FILED
JAN 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1988

HENRICO COUNTY PUBLIC SCHOOLS, MALCOLM M. CHRISTIAN, WILLIAM C. BOSHER, JR., MORTON BRADMAN, JOANN MARCHANT, PATRICIA MARTIN, GWENDOLYN WHITING, DOROTHY SUGERMAN, and DONALD MAYFIELD,

Defendants/Petitioners,

v.

JONATHAN SPIELBERG, a minor by his parents, HOWARD AND SUSAN SPIELBERG, as his next friend; HOWARD SPIELBERG AND SUSAN SPIELBERG,

Plaintiffs/Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

If this Court grants the petition for writ of certiorari, the Respondents request this Court also to consider, as an alternative ground for upholding the judgment of the Fourth Circuit, the following issue:

> **Under the Education for All Handicapped Children Act, where a school system seeking to change the educational placement of a child requests a due process hearing, and the school system is unsuccessful at the local due process hearing in establishing the appropriateness of its Individual Educational Program (IEP), but is successful at the state administrative review, does the school system retain the burden of proving the appropriateness of its placement when the United States District Court makes its independent review of the appropriateness of the IEP?**

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B. Even Assuming Henrico County Were Correct That Some Procedural Violations Are Not Sufficient To Find A Failure To Provide A FAPE, Both The Trial Court And The Fourth Circuit Panel Made A Factual Determination That The

Procedural Violation In The Instant Case Was Significant, And Hence, A Necessary Predicate To Henrico County's First Question Presented Is Missing. 6

II. Henrico County's Argument That There Is No "Intent Test" Under The EAHCA Does Not Raise A Significant Issue Of Law, Since The Fourth Circuit Did Not Look To The Intent Behind Henrico County's Illegal Unilateral Decision By The School System, The Court Merely Determined That Such Illegal Action Had Been Taken. 12

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STATUTORY AND REGULATORY PROVISIONS

20 U.S.C. § 1401(18)(D) provides:

> The term 'free appropriate education' means special education and related services which ... are provided in conformity with the individualized education program.

Alaska Education Regulations, Chapter 52, § 150(a) provides:

> Each district shall place the child after development or revision of an IEP in conformity with the IEP.(emphasis added).

Connecticut State Plan for Part B of the Education of the Handicapped Act as Amended by P.L. 94-142, § 10-76-d-16 provides:

> Each board of education shall make educational placements in accordance with the requirements set forth in the individualized education program of each child ....

District of Columbia State Plan, Fiscal Year 1987-1989, § 3007.4 provides:

> Upon completion of the IEP conference, the child study team shall recommend a program and placement for the student.(emphasis added).

Indiana State Board of Education

Rules, Regulations and Policies, Rule

S-1(4)(E)(3)(c) (1978) provides:

> Following the determination of eligibility and development of an individualized education program, the Case Conference Committee shall recommend appropriate placement ....(emphasis added).

Louisiana Regulations For

Implementation of the Exceptional

Children's Act, § 445(A) (1983)

provides:

> When the IEP development section of the meeting is completed, the school system should initiate the placement section of the meeting immediately following the IEP meeting.(emphasis added).

New Hampshire Standards for Education

for the Handicapped Students, § 1115.02

provides:

> The decision to place any educationally handicapped student shall occur after and pursuant to the approval of an Individualized Education Program....(emphasis added).

Regulations Governing Special

Education Programs For Handicapped

Children And Youth In Virginia,

II(B)(2)(i)(1)(b) provides:

> Each LEA placing a child shall ensure that ... [e]ach child's educational placement ... [i]s based on his/her IEP ....

Virginia Proposed Regulation

II(B)(2)(6)(b), p. 71 provides:

> Where a child is presently receiving the services of a private school or facility, or <u>where the parents and the LEA agree</u>, prior to the development of an IEP that a private school or facility <u>may</u> be required when the IEP is completed, the local school division shall ensure that a representative of the private school attends the meeting.... (emphasis added).

Appendix C to 34 C.F.R., Part 300,

Question 5, p.74 (1987) provides:

> 5. <u>For a handicapped child receiving education for the first time, when must an IEP be developed</u> -- <u>before placement or after placement</u>?
>
> .... The appropriate placement for a given handicapped child cannot be determined until after decisions have been made about what the child's needs are and what will be provided. Since these decisions are made at an IEP meeting, it would not

be permissible to first place the child and then develop the IEP. Therefore, the IEP must be developed before placement.(emphasis added). Id. at Ques. 5, p. 74.

STATEMENT OF THE CASE

The Respondents, Jonathan, Howard and Susan Spielberg, respectfully request this Court deny the petition for writ of certiorari.

In disagreement with Petitioners' (Henrico County) Statement Of The Case (Petition for Certiorari p. 17), the Spielbergs point out that the trial court did not base its finding of a procedural violation of the Education For All Handicapped Children Act (EAHCA or EHA) solely on a letter dated September 13, 1985. As indicated by the Petitioners Appendix To Petition For Writ Of Certiorari pp. 53-56 (Pet. App.) the trial court relied upon "documentary and other evidence presented in this action which clearly evince a predetermination of the placement issue." (Id. at 53). The trial court then made reference to

specific pieces of evidence, one of which was this letter of September 13, 1985.

In addition to the information contained in Henrico County's Statement of the Case, the Spielberg's point out that the Fourth Circuit in this case was also presented with the question of whether the IEP drafted by Henrico County would, in the absence of the procedural violation, provide Jonathan with a free appropriate public education (FAPE). The trial court held that Henrico County had failed to meet its burden of proof on the appropriateness of the IEP even in the absence of the procedural violation.

Affirming the trial court's decision that Henrico County's action would not provide a FAPE, the Fourth Circuit based its decision on the procedural violation. The Fourth Circuit did not accept the trial court's reasoning on the question of the IEP's appropriateness absent the

procedural violation. The Fourth Circuit stated that the trial court had improperly placed the burden of proof on that question on Henrico County. Since the procedural violation provided an alternative rationale for affirming the trial court's decision, there was no need to remand to the trial court for a rehearing on whether, in the absence of the procedural violation, Henrico County's IEP would provide a FAPE.

REASONS FOR DENYING THE WRIT

I. Henrico County's Petition Should Be Denied Because It Raises Issues Which Are Purely Factual.

A. Contrary To The Argument Advanced By Henrico County, The Fourth Circuit's Decision Is Consistent With This Court's

Decision In Board of Education Of Hendrick Hudson Central School District v. Rowley, And Is Merely A Straight Forward Factual Application Of Rules Enunciated By This Court As Long Ago As Rowley And As Recently As Honig v. Doe.

The EHA provides extensive procedural protection to the parents of handicapped children. An important element in the procedural protection afforded under the EHA is the right to parental participation in all stages of the educational process. Board of Education Of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982). As stated by this Court in Rowley, "It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with

procedures giving parents and guardians a large measure of participation at every stage of the administrative process ... as it did upon the measurement of the resulting IEP against a substantive standard." Id. at 205-206. Even more recently, in Honig v. Doe, 108 S. Ct. 592, 598 (1988), this Court emphasized the importance of "meaningful input [by the parents] into all decisions affecting their child's education ...."

This Court requires that courts hearing cases under the EHA to make a determination of procedural compliance. Rowley, at 206-207. Consistent with this requirement, the trial court made the factual finding, and the Fourth Circuit concurred, that Henrico County unilaterally decided to move Jonathan prior to development of an IEP on which that placement decision could be made. As the Fourth Circuit stated: "The decision

to place Jonathan at Randolph before developing an IEP on which to base that placement violates [the law]. It also violates the spirit and intent of the EHA, which emphasizes parental involvement. After the fact involvement is not enough." (App. 12-13).

Having made that factual determination, the appropriate remedy for the procedural violation was clear. The remedy, without dissent among the circuits, has been to find the school system's action would not provide the FAPE required by the EHA See e.g., Jackson v. Franklin County School Board, 806 F.2d 623, 629 (5th Cir. 1986); Hall v. Vance County Board of Education, 744 F.2d 629, 635 (4th Cir. 1985).

B. Even Assuming Henrico County Were Correct That Some Procedural Violations Are Not

Sufficient To Find A Failure To Provide A FAPE, Both The Trial Court And The Fourth Circuit Panel Made A Factual Determination That The Procedural Violation In The Instant Case Was Significant, And Hence, A Necessary Predicate To Henrico County's First Question Presented Is Missing.

Henrico County argues that the Fourth Circuit's decision in the instant case is inconsistent with this Court's decision in Rowley, 458 U.S. 176 (1982). Henrico County argues that the Fourth Circuit rejected what Henrico has labeled an "adequate compliance standard" and substituted a "zero tolerance" standard for review of procedural violations.

Even assuming Henrico County were correct that some procedural violations are not sufficient to find a failure to provide a FAPE, the procedural violation in the instant case was found by both the trial court and the Fourth Circuit panel to be a significant violation.

In the trial court's original decision, the court stated: "Placing a handicapped child without reference to his I.E.P. violates both the letter and spirit of the Act and its implementing regulations." (Petitioners' App. 56) The Fourth Circuit in language very similar stated: "The decision to place Jonathan at Randolph before developing an IEP on which to base that placement violates [the law]. It also violates the spirit and intent of the EHA, which emphasizes parental involvement. After the fact involvement is not enough." (Pet. App. 12-13). Therefore, based on the factual

findings in the instant case, Henrico County's so called "zero tolerance" issue is not even raised, since the violation was found as a matter of fact to be significant.

Further, even assuming "adequate compliance" is something less than following the regulations as written, exclusion of the parents from decision-making could never constitute adequate compliance. These procedural steps are not mere formalities, nor are they merely technical. The procedures are the primary means by which the parents insure the appropriate program is provided to his or her child. As pointed out in Rowley, "Adequate compliance with the procedures [will] in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." 458 U.S. at 206. See also Jackson v. Franklin County School Board, 806 F.2d 623, 630

(5th Cir. 1986)("[t]he formality of the Act's procedures is itself a safeguard against arbitrary or erroneous decision-making.").

Henrico County, also alleges that the factual finding of a procedural violation was in error. Henrico County alleges that the Fourth Circuit's decision was in error because "the Fourth Circuit panel decided that because Henrico sent ... notice of a proposed change in placement before, rather than after, an IEP with the Spielbergs ...." (Petition for Writ p. 28)(emphasis in original).

This argument is misleading in two respects. First, it implies the trial court and the Fourth Circuit relied solely on one letter to reach the factual conclusion. Indeed, there were many documents and considerable testimony submitted to support the procedural

violation finding. (See Pet. App. pp. 53-56). Second, the argument implies that the courts below found Henrico had made a proposal, when in reality, the lower courts made a factual determination that Henrico County had made a unilateral decision.

Further, to the extent Henrico County premises its petition on an allegation that this factual finding was in error, the petition request must fail. This Court has repeatedly stated that "[w]e do not grant a certiorari to review evidence and discuss specific facts." United States v. Johnson, 268 U.S. 220, 227 (1925). In fact, in situations such as the instant case, where the circuit court has concurred with the factual findings of the trial court, this Court has stated that "a court of law, such as this Court is, rather than a court for correction of errors in fact finding,

cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious an exceptional show of error." Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1949); see also Branti v. Finkel, 445 U.S. 507, 512 n.6 (1980).

II. Henrico County's Argument That There Is No "Intent Test" Under The EAHCA Does Not Raise A Significant Issue Of Law, Since The Fourth Circuit Did Not Look To The Intent Behind Henrico County's Illegal Unilateral Decision By The School System, The Court Merely Determined That Such Illegal Action Had Been Taken.

The lower courts did not look to the intent of Henrico County in making its illegal unilateral decision. In Rowley, this Court stated that part of a court's

analysis of a case arising under the EAHCA is "has the State complied with the procedures set forth in the Act?" Rowley, 458 U.S. at 206. The courts below looked to whether the premature placement decision had been made, not to the intent behind making the decision. The trial court decided this factual question against Henrico County, and the Fourth Circuit concurred.

Contrary to the assertion of Henrico County, the Fourth Circuit decision will not hamstring the schools in making decisions concerning disciplinary problems. This Court in Honig recognized the importance of parental participation in the educational decision-making. Inherent in the Honig decision is the recognition that a school cannot unilaterally suspend a child for more than 10 days because the EAHCA requires parental participation in decisions

concerning a change in placement (i.e. suspend the child).[1]

The instant case is completely consistent with Honig. Indeed, it is merely the application of the Honig rationale in a different, though related, context. Not only is a school system prohibited from unilaterally suspending a child (except for 10 days because of exigent circumstances), the Fourth Circuit is merely saying that the school system cannot make the same unilateral

---

[1] This participation comes in the form of an individualized education program (IEP) meeting and subsequent discussion of any need to change placement, based on the revised IEP. The linchpin of both the procedural and substantive rights under the EHA is the development of an IEP for each handicapped child. The IEP is the written statement of the child's educational goals and objectives. The IEP is the method adopted by Congress to insure that each child's education was to be individualized with extensive parental involvement. Rowley, 458 U.S. at 208-209; Honig, at 598.

decision concerning other handicapped children.

III. There Is No Conflict In The Decision Of The Instant Case With The Decision Of Any Other United States Circuit Court Of Appeals, Nor Has The Fourth Circuit Decided A Federal Question In A Way Which Conflicts With A State Court Of Last Resort.

Henrico County has made an allegation in its petition that the Fourth Circuit's Decision in the instant case conflicts with three other cases. At most, Henrico County alludes to an inconsistency between the Fourth Circuit's decision in the instant case, and two other decisions by the Fourth Circuit, Hudson v. Wilson, 828 F.2d 1059 (4th Cir. 1987) and Patterson C. v. Board of Education Of Prince George's County,

Maryland, No. 86-2638 (4th Cir. May 7, 1986)(per curiam, unpublished). (See Petition For Certiorari, pp. 20, 34) and to some unspecified conflict with a Fifth Circuit decision, Jackson v. Franklin County School Board, 806 F.2d 623 (5th Cir. 1986).

Putting aside the fact that this Court has indicated that an intracircuit conflict is insufficient grounds for granting a writ of certiorari, see Davis v. United States, 417 U.S. 333, 340 (1974), there is no real conflict between Hudson and Patterson C. on the one hand, and the instant case on the other.

Hudson is distinguishable from the instant case on the factual question of whether a premature placement decision has been made. In Hudson, the court found that there was merely a proposal to be discussed at the IEP meeting. In the instant case, the lower courts found that

a unilateral decision had been made by Henrico County. This distinction is critical. Nothing precludes school systems or parents from making proposals which are discussed and then jointly accepted or jointly rejected. As clearly found by both the trial court and the Fourth Circuit, Henrico County unilaterally decided to change Jonathan's placement.

The supposed conflict with the unpublished decision in Patterson C. was directly addressed by the Fourth Circuit in the instant case. See Petitioners' App. pp. 13-14.

There is nothing inconsistent with Jackson and the instant case. In Jackson the court was merely holding that once the school system has evidence that there are problems with the student's educational program, notice should be given and a meeting should be called.

Jackson does not stand for the proposition that the school system can unilaterally decide to change the student's placement and then give notice. Jackson stands for the proposition that once the school system is aware of a possible problem they should communicate with the parents so the problem can be addressed and solved jointly.

IV. Henrico County's Argument That There Was No Procedural Violation Because It Is Permissible To Make Placement Decisions Prior To Development Of The IEP Is Contrary To The Law And Henrico County's Own Position Taken Through The Trial Of The Case.

A. State And Federal Regulations Require Placement Decisions Be Made After Development Of The

Individualized Education Program.

The EHA and supporting regulations are explicit in requiring placement be based on an existing IEP. 34 C.F.R. § 300.552 provides: "Each public agency shall insure that ... [e]ach handicapped child's educational placement ... [is] based on his or her individualized education program ...."

In defining the term "free appropriate education" Congress provided that it "means special education and related services which ... are provided in conformity with the individualized education program ...." 20 U.S.C. § 1401(18)(D). An appropriate education, therefore, is one which addresses the goals and objectives of the IEP. An appropriate educational placement in turn be must premised on the goals and

objectives of the IEP. The appropriate placement, therefore, can only be determined after the development of the IEP containing the individualized goals and objectives.

The United States Department of Education, is emphatic in its interpretation that placement decisions must await completion of the IEP: "42. When must IEP objectives be written--before or after placement? IEP objectives must be written before placement...." 34 C.F.R. Pt. 300, App. C, at 84 (1987).

In response to another question, the same emphatic response is given:

> .... The appropriate placement for a given handicapped child cannot be determined until after decisions have been made about what the child's needs are and what will be provided. Since these decisions are made at an IEP meeting, it would not

be permissible to first place the child and then develop the IEP. Therefore, the IEP must be developed before placement.(emphasis added). Id. at Ques. 5, p. 74.[2]

---

[2] It is anticipated that amicus curiae will argue that this Court should grant the writ based on the Fourth Circuit's language indicating that under some circumstances a placement decision can be made prior to development of the IEP. (Pet. App. 14). The Fourth Circuit's language on this point, however, is completely consistent with the law, as interpreted by the United States Department of Education. 34 C.F.R., Part 300, Appendix C, Question 59 (1987)(quoted in Petition For Writ p. 11).

It is important to note that even in the limited circumstances envisioned by Question 59, nothing gives the school system the right to make this pre-IEP decision unilaterally. The Department of Education is explicit that "both" the parents and that school system must agree. Id. The Virginia Department of Education presently has under consideration a proposed regulation which specifically addresses this issue consistent with Question 59 and the Fourth Circuit's language in this case. See Virginia Proposed Regulation II(B)(2)(6)(b), p. 71, quoted, supra, p.

Further, it should be pointed out, that, at worse, the Fourth Circuit's language concerning permissible pre-IEP decisions is dicta.

B. Numerous State Special Education Regulations Are In Accord With The Interpretation That The IEP Must Be Developed Prior To A Placement Decision.

Numerous state regulations explicitly articulate the important concept that IEP precede placement decisions. See e.g. Alaska Education Regulations, Chapter 52, § 150(a); Connecticut State Plan for Part B of the Education of the Handicapped Act as Amended by P.L. 94-142, § 10-76-d-16; District of Columbia State Plan, Fiscal Year 1987-1989, § 3007.4; Indiana State Board of Education Rules, Regulations and Policies, Rule S-1(4)(E)(3)(c) (1978); Louisiana Regulations For Implementation of the Exceptional Children's Act, § 445(A) (1983); New Hampshire Standards for Education for the Handicapped

Students, § 1115.02. Each of the above cited provisions is quoted in Statutory And Regulatory Provisions, supra p. .

In Virginia, the regulations parallel the language of federal regulation 34 C.F.R. § 300.552, and provide "Each LEA placing a child shall ensure that ... [e]ach child's educational placement ... [i]s based on his/her IEP ...." Regulations Governing Special Education Programs For Handicapped Children And Youth In Virginia, II(B)(2)(i)(1)(b).

C. In Argument In The District Court, Henrico County Itself Has Recognized That The Placement Decision Is To Follow Development Of The IEP.

Henrico County, despite taking a contrary position on appeal, has

indicated that it accepts that development of the IEP must precede a decision on placement.

As late as the final memorandum of law submitted to the district court on the procedural violation issues, Henrico County stated: "The defendants have never asserted that a placement decision can be made before an IEP meeting." Defendants' Reply Memorandum In Support Of Motion To Alter Or Amend, p. 3.

V. The Petition Should Be Denied Because Even Were Henrico County Successful In Seeking A Reversal Of The Fourth Circuit's Procedural Violation Rationale, An Independent Rationale For Affirmation Exists On The Grounds That, Even In The Absence Of A Procedural Violation, Henrico County's IEP Would Not Provide Jonathan With A FAPE.

The Fourth Circuit's decision did not accept the lower court's reasoning that, independent of the procedural violation, Henrico County's IEP would not provide a FAPE, The panel believed that the burden of proof was misapplied by the trial court. (Pet. App. 11) The Spielberg's assert that the trial court was correct in the allocation of the burden of proof, and that the substantive decision of the trial court that the IEP was inappropriate is an alternative ground for upholding the Fourth Circuit's decision.

Should this Court grant Henrico County's petition, the Spielberg's seek to challenge the Fourth Circuit's reasoning on the burden of proof and establish that the appropriate allocation of the burden of proof was upon Henrico County.

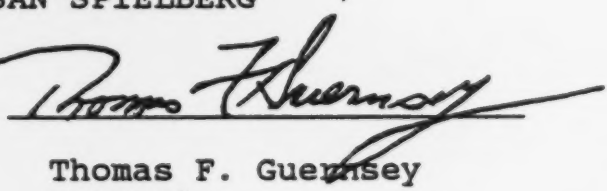
This question is important for two reasons. First, as stated, this provides an alternative ground for upholding the Fourth Circuit decision, and is properly raised in this Court without a cross-petition. Washington v. Yakima Indian Nation, 439 U.S. 463, 476 n.20 (1979)(cross-petition not necessary "to defend a judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered ...."). Second, even if Henrico County were successful in this Court, the case would have to be remanded to the trial court for a determination of the substantive question, allocating the burden of proof to the parents. If the Spielbergs are successful in having this Court accept the additional rationale that the burden of proof was appropriately applied, this remand would be unnecessary, since the Fourth Circuit

could then decide whether the trial court's factual conclusion was clearly erroneous.

CONCLUSION

The Petition for Writ of Certiorari should be denied. If, however, this Court grants the writ, the Court should also consider whether the Fourth Circuit was in error in stating the trial court misapplied the burden of proof.

JONATHAN SPIELBERG
HOWARD SPIELBERG
SUSAN SPIELBERG

By 

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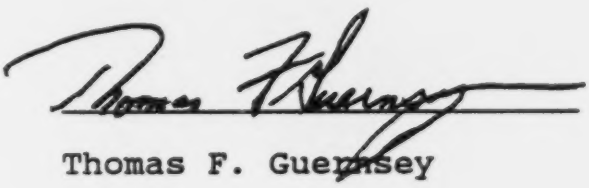
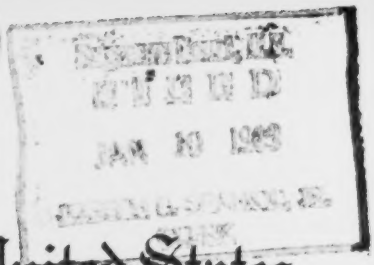
CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of January, 1989, a true and accurate copy of the foregoing Respondents' Brief In Opposition was mailed First Class to Joseph Thomas Tokarz, II, counsel for Petitioners, at P.O. Box 23120, Richmond, Virginia 23223, and to Kathleen S. Mehfoud, counsel for amicus, at 411 E. Franklin Street, Suite 602, Richmond, Virginia 23219.



Thomas F. Guernsey

No. 88-1022



In The Supreme Court Of The United States

OCTOBER TERM, 1988

HENRICO COUNTY PUBLIC SCHOOLS, MALCOLM M. CHRISTIAN, WILLIAM C. BOSHER, JR., MORTON BRADMAN, JOANN MARCHANT, PATRICIA MARTIN, GWENDOLYN WHITING, DOROTHY SUGARMAN, and DONALD MAYFIELD,

Defendants/Petitioners,

v.

JONATHAN SPIELBERG, a minor by his parents, Howard and Susan Spielberg, as his next friend; HOWARD SPIELBERG; and SUSAN SPIELBERG,

Plaintiffs/Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF CALLING ATTENTION TO INTERVENING MATTER

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No. 88-1022

In The
Supreme Court Of The United States

October Term, 1988

HENRICO COUNTY PUBLIC SCHOOLS, MALCOLM M. CHRISTIAN, WILLIAM C. BOSHER, JR., MORTON BRADMAN, JOANN MARCHANT, PATRICIA MARTIN, GWENDOLYN WHITING, DOROTHY SUGARMAN, and DONALD MAYFIELD,

Defendants/Petitioners,

v.

JONATHAN SPIELBERG, a minor by his parents, Howard and Susan Spielberg, as his next friend; HOWARD SPIELBERG, and SUSAN SPIELBERG,

Plaintiffs/Respondents.

Supplemental Brief Calling Attention To Intervening Matter

REGULATORY PROVISIONS INVOLVED

Page 18 of The Process for Special Education Determination in Virginia (Clarification of Issues) (Screening, Assessment/Eligibility, IEP

Development/Implementation) (April, 1986) published by the Virginia State Department of Education provides, in relevant part, as follows:

- Under what circumstances can existing data be considered "current"?

  Generally, assessment data less than 6 months old may be considered current and thus presented to the committee(s) for review and consideration in decision making. Information older than 6 months must be updated by an appropriate professional....

  Such factors as the age of the student, the severity of the handicap, the dynamics of the home environment, etc., may necessitate the need for immediate comprehensive assessment data.

STATEMENT OF THE CASE

On December 16, 1988, Henrico officials filed their Petition for Writ of Certiorari and accompanying Appendix with the Clerk of this Court. Subsequent to delivery of the Petition to Henrico's

commercial printing service, Henrico's counsel learned of a December 5, 1988 letter from the Supervisor, Due Process Proceedings, for the Virginia State Department of Education. This letter is reproduced in the Appendix at pages I-VII.[1]

Because the letter states the Virginia State Department's contrary interpretation on two issues relied upon by the Fourth Circuit Court of Appeals, this supplemental brief respectfully directs the Court's attention to pertinent portions of the letter. In particular, the letter states the view that "we are in the position as the State

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[1] Because the Appendix to the Petition used arabic page numbers, the Appendix to this Supplemental Brief uses Roman numerals for its page numbering.

Department of Education to interpret our regulations." App. VI. Cf. Whirlpool Corp. v. Marshall, 445 U.S. 1, 11 (1980) (agency's interpretation "is entitled to deference unless it can be said not to be a reasoned and supportable interpretation of the Act.") This supplemental brief is authorized by Rule 22.6 of the Rules of the Supreme Court of the United States of America.

ADDITIONAL REASONS FOR GRANTING THE WRIT

I. The Department Which Administers Virginia's Special Education Program Continues To Interpret Virginia's Regulations Contrary To The Fourth Circuit's Decision.

A. The Virginia State Department Of Education Recently Reaffirmed That Evaluations Older Than Six Months

Must Be Updated For Educational Decision-making Despite The District Court's And Fourth Circuit's Disapproval Of That Practice By Henrico.

The district court and the Fourth Circuit reached erroneous conclusions about Henrico's EAHCA compliance in part because they misunderstood Virginia's special education requirements and overlooked the state's regulatory guidance to local school divisions.

Both courts cited Henrico's initiation of a reevaluation nine months after Jonathan's triennial reevaluation as evidence of an illegal predetermination process. See, infra. However, the Virginia State Department of Education has held that evaluations older than six months are not considered "current" for

educational decision-making and must be updated. The Process for Special Education Determination in Virginia (Clarification of Issues) (Screening, Assessment/Eligibility, IEP Development/Implementation), 18. (April 1986).

Virginia's "current" reevaluation requirement contradicts district court's reliance upon the "special reevaluation ... only nine months after the regular triennial evaluation" as proof of Henrico's alleged procedural violation. App. 55. Significantly, the same error was echoed in the Fourth Circuit's specific reference to the 1985 reevaluation as "only nine months after a regular triennial evaluation." App. 5.

Even after the Fourth Circuit's Spielberg decision, the Virginia State Department of Education's December 5,

1988 letter confirms that Henrico's 1985 reevaluation was required despite the July, 1984 triennial evaluation. In referring to reevaluations to assist review of placement recommendations, Kathe Klare, the state's Supervisor, Due Process Proceedings, wrote that "if the evaluations are eight months old, a reevaluation would be needed." App. IV-V.

Therefore, four months after the Fourth Circuit's decision, the Virginia State Department of Education, still interpreted Virginia's special education regulatory scheme to mandate the reevaluation initiated by Henrico in March, 1985. The district court's finding of fact on this issue was erroneous because it did not recognize the Virginia reevaluation requirement. The Fourth Circuit's reliance upon the

erroneous finding of fact for its conclusion renders its decision reversible as well.

B. The State Department of Education Recently Stated That Reevaluations For Consideration Of A Placement Change Do Not Constitute Predetermination Because Reevaluations Perform The Function Of "Collecting Data" For Decision-making.

The district court and Fourth Circuit were also erroneous in their evaluation of the evidence because they viewed Henrico's 1985 reevaluation process as evidencing placement predetermination. In the hindsight of the district court, Henrico requested the updated reevaluations "for the express purpose of

supporting a change in placement." App. 56. However, Ms. Klare's letter expresses the "Department's position" that "it is not predetermination when an IEP committee is considering a change in placement and consequently recommends re-evaluations to determine whether a placement change is warranted." App. V.

> This is the process of collecting data in order that the goals and objectives can be developed to determine what, if any, placement chnage is necessitated based on the required services to meet the invididual needs of the child. Id.

In short, the December 5, 1988 letter reconfirms Henrico's position that both lower courts miscomprehended Virginia special education requirements. This misunderstanding led to the district court's erroneous finding of fact upon which the Fourth Circuit incorrectly relied.

CONCLUSION

Because the Fourth Circuit and the district court misunderstood Virginia law, the Fourth Circuit's procedural compliance decision should be summarily reversed. If summary reversal is not appropriate, Henrico prays that its Petition for Writ of Certiorari be granted.

HENRICO COUNTY PUBLIC SCHOOLS
MALCOLM M. CHRISTIAN
WILLIAM C. BOSHER, JR.
MORTON BRADMAN
JOANN MARCHANT
GWENDOLYN WHITING
DOROTHY SUGARMAN
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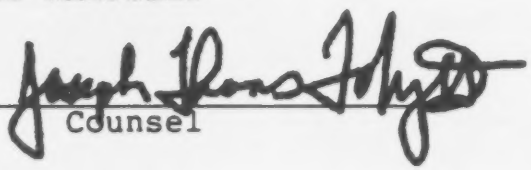
By 
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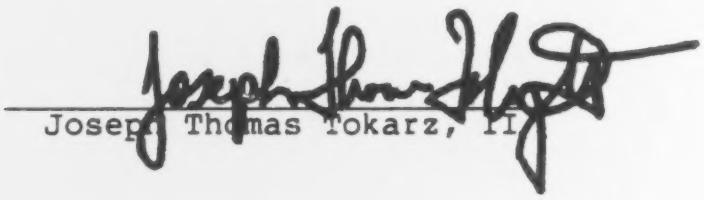
CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of January, 1989, a true and accurate copy of the foregoing Supplemental Brief Calling Attention To Intervening Matter was mailed postage paid, first class mail, to the offices of: Thomas Franklin Guernsey, Esq., Associate Professor of Law, Youth Advocacy Clinic, University of Richmond, Richmond, Virginia 23173 and Kathleen S. Mehfoud, Esq., 411 E. Franklin Street, Suite 602, Richmond, Virginia 23219.



Joseph Thomas Tokarz, II

December 5, 1988

Dr. Jo Lynne DeMary
Director of Special Education
Henrico County Public Schools
P. O. Box 23120
Richmond, Virginia 23223

Dear Dr. DeMary:

I am in receipt of the letter you sent to both Mr. Goode and me. Please forgive the delay in responding but we at the Department wished to give the questions the proper amount of thought and attention. Therefore, the issue has been discussed with the position committee and special education personnel.

You have raised some legitimate questions about the Department's interpretation of position 88-021 which relates to the requirements for re-evaluation when a significant change in placement occurs. The position committee has been discussing this issue and although I hoped a response would be

forthcoming we are still not able to provide you with a final response. We expect a final decision in January.

We agree the position needs to be clarified for those situations where a signficant change in placement does not occur. For example, the committee has identified those situations where a child may be in a position of changing from a program where 49% of the school day is spent in the resource class to a program where 51% of his time is spent in a special education program which may now be considered a self contained program.

The Department, as you are aware, has defined a signficant change in placement in the proposed regulations based on research Dr. Judith Barnhiser completed for a response to a complaint she received. Dr. Barnhiser relied on OCR opinions and the requirements under Section 504 of the Rehabilitation Act of

1973 and then developed position 88-021 that was disseminated to the LEAs. According to this definition, a change in the level of services on the continuum of special education services, for example, resource, self-contained is defined as one of these changes where re-evaluation is required. The regulations which were adopted in 1984 require a re-evaluation every time there is a significant change in placement which was added to the regulations at the advice of the Assistant Attorney General. The word significant, however, is not defined other than by examples of changes. Since there are degreees of changes along the continuum, we agree that the position as written may be unclear as to those situations where re-evaluation may not be required and can be determined by the IEP committee without referral for more evaluations. Therefore, we will be

sending out a revised position in order to clarify the meaning and requirements for reevaluation.

In addition, you have cited the Clarification of Issues as a document which cites present positions. This document is no longer considered valid by the Department. That is one of the purposes of the position committee. A Superintendent's Memo has been sent to the LEAs on this issue.

Regarding re-evaluation, you may be aware that it does not mean that you must conduct new assessments, but rather that the LEA may choose to review the data and indicate that it is current and valid. This may be helpful in the situation where the IEP committee is considering the recommendation of a residential placement. For example, if the evaluations are eight months old, a re-evaluation would be needed. The re-

evaluation may result in conducting new components or validating some components and deciding to complete selected components only, for example, the educational assessment.

The Department's position is that it is not pre-determination when an IEP committee is considering a change in placement and consequently recommends re-evaluations to determine whether a placement change is warranted. This is the process of collecting data in order that the goals and objectives can be developed to determine what, if any, placement change is necessitated based on the required services to meet the individual needs of the child.

As you mentioned, the Department did not identify the specific decisions relied upon since we did not believe that to be necessary. As you suggest,

however, perhaps we need to add cites to our decisions.

Regarding your request for an official interpretation by U.S.D.O.E., we are in the position as the State Department of Education to interpret our regulations. These interpretations may change depending on new policy and decisions. Therefore, positions may not remain the same. We do not believe that we need to petition the U. S. Department of Education for an official ruling. As you are aware, the proposed regulations have the definition of "significant change in placement" which includes the change along the continuum of services. We will have an additional comment period for these regulations which expires on December 21, 1988. As you are aware, the Department is responsive to concerns and will seriously review the comments for any ncessary changes.

If you wish to submit additional comments which address the positions or regulations, please send them to me at the above address.

Sincerely,

[signed]

Kathe Klare
Supervisor, Due Process Proceedings
[Virginia Department of Education]

KK/pw

Supreme Court, U.S.
FILED
JAN 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-1022

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HENRICO COUNTY PUBLIC SCHOOLS, MALCOLM M. CHRISTIAN, WILLIAM C. BOSHER, JR., MORTON BRADMAN, JOANN MARCHANT, PATRICIA MARTIN, GWENDOLYN WHITING, DOROTHY SUGERMAN, AND DONALD MAYFIELD,

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BRIEF AMICUS CURIAE OF THE VIRGINIA SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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No. 88-1022
IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

HENRICO COUNTY PUBLIC SCHOOLS
MALCOLM M. CHRISTIAN, WILLIAM C. BOSHER, JR., MORTON BRADMAN, JOANN MARCHANT, PATRICIA MARTIN, GWENDOLYN WHITING, DOROTHY SUGERMAN, AND DONALD MAYFIELD,

Defendants/Petitioners,

v.

JONATHAN SPIELBERG, a minor by his parents, Howard and Susan Spielberg, as his next friend; HOWARD SPIELBERG; and SUSAN SPIELBERG,

Plaintiffs/Respondents.

BRIEF AMICUS CURIAE OF THE VIRGINIA SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF THE AMICUS CURIAE

The Virginia School Boards Association ("VSBA") is an association

formed pursuant to Va. Code Ann. §15.1-20 to promote the interests and welfare of the school boards of the Commonwealth of Virginia. VSBA's membership is composed solely of school boards, which are political subdivisions of the Commonwealth. Every school board in the Commonwealth, numbering one hundred and thirty, is a member of VSBA.

Approximately ten percent of all students enrolled in the public schools in Virginia are identified as handicapped. This decision affects the placement procedures to be utilized for all of these handicapped students. The interpretation of placement procedures under the Education of All Handicapped Children Act ("EHA"), 20 U.S.C.

§§1401, et seq., is a very basic aspect of special education procedures. Accordingly, the effects of the decision in this case will have far-reaching implications for the operations of school systems.

It is the position of VSBA that the decision by the Fourth Circuit in this case cannot be implemented due to an internal inconsistency in its holding. VSBA further believes that the decision is contrary to the express terms of the federal regulations enacted under EHA. Finally, VSBA is convinced that the ruling by the Fourth Circuit will not serve the interests of handicapped children in Virginia. For these reasons, VSBA files this brief amicus

curiae in support of the petition for the granting of a writ of certiorari.

SUMMARY OF ARGUMENT

The Fourth Circuit's decision in this matter must be reversed because it incorrectly interprets the meaning of the term placement and the placement regulations under EHA. Placement is the level of services to be provided to a particular handicapped child and not the selection of a particular school. Furthermore, there is no means by which school boards can comply with the Fourth Circuit's decision because of the internal inconsistency in its holding which requires a predetermination of placement in every case, yet holding

that in the case of public placements, such a determination is procedurally flawed. Finally, VSBA is concerned that to give effect to the holding of the Fourth Circuit will cause delays in the implementation of an IEP and promote mistrust between the parents and school divisions thereby hampering the education to be provided to a handicapped child.

ARGUMENT

I.

THE DECISION OF THE FOURTH CIRCUIT IS INTERNALLY INCONSISTENT IN THAT TO GIVE EFFECT TO ITS HOLDING REQUIRES THAT A PREPLACEMENT DETERMINATION BE MADE IN EVERY CASE WHILE PROHIBITING THE MAKING OF THAT SAME DETERMINATION.

The Fourth Circuit held that

Henrico County violated EHA's procedures by predetermining placement prior to the development of the individualized education plan ("IEP"). App. 13-14. The action on the part of Henrico County was held sufficient to invalidate the IEP. The decision specifically authorizes, however, such a preplacement determination for placements made in private schools. A distinction was drawn by the Fourth Circuit between procedures to be utilized for placements made in public schools and those made in private schools. The court viewed private school placements to be an exception to the general rule prohibiting placement decisions being made prior to development of the IEP. The

exception was recognized by the Fourth Circuit because of the regulatory requirement that a representative of the private school be present at the IEP meeting if placement is to be made in a private school. 34 C.F.R. §300.347(a)(2). Obviously, to comply with that regulatory dictate requires the placement to be determined in advance of the IEP meeting.

The Fourth Circuit went on to prohibit this determination of placement prior to development of the IEP in the case of public school placements. This holding is internally inconsistent. In order to give effect to this decision, a decision on placement must be made in advance of the development of the IEP in

every case. An initial pre-IEP decision must be made as to whether the placement will be in a public or private program. Under the ruling of the Fourth Circuit, if the determination were made that the placement should be private, no procedural violation would result because the exception applies. If, however, that determination results in the selection of a public program, which the Fourth Circuit recognized would be the result in the majority of cases, the making of that determination would be a procedural violation. The resulting IEP would then be procedurally flawed and invalid without further inquiry.

To let the decision stand will cause confusion in the school systems.

It is believed that the confusion that is engendered could not serve the interests of the handicapped child.

II.

EHA DOES NOT PROHIBIT DETERMINING PLACEMENT IN ADVANCE OF DEVELOPMENT OF THE IEP.

The illogical approach to placement decisions that results from the decision of the Fourth Circuit is due to a misunderstanding of the placement procedures of EHA. The regulations which have been misconstrued and which formed the basis for the decision of the Fourth Circuit neither expressly nor implicitly prohibit a determination of placement prior to the development of the IEP. The regulations very logically

provide that an IEP must "be in effect before special education and related services are provided to a child." 34 C.F.R. §300.342(b)(1). Additionally, further provisions make clear that placement must be based on the IEP. 34 C.F.R. §300.552(a)(2). No prohibition is expressed on determining placement prior to IEP development.

An IEP serves as a blueprint of the special education services that a handicapped child needs in order to receive an appropriate education. Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982). Those services must be specified in advance of putting the child in a special education program;

otherwise, the handicapped child might receive too few services or too many and not be educated in the least restrictive environment. When the statement is made in the regulations that placement is made based on the IEP, it means simply that no more services and no fewer services are to be provided than are specified in the IEP and that the IEP must already have been determined.

This view is predicated on the opinion that placement, rather than being defined as the selection of a particular school, is really the determination of the level of special education services to be provided to a

handicapped child.[1] There is no specific definition of placement contained in the EHA or its regulations; however, support for this approach to the concept of placement as a program of services is found in the regulations. In discussing the dictate that a continuum of alternative placements be available, the continuum is defined to include "...instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions" and "...supplementary services (such as

---

[1] In its opinion, the Fourth Circuit erroneously viewed Melmark and Virginia Randolph Special Education Center as placements rather than the program specified in the IEP. The Court did not address the level of services provided in the IEP.

resource room or itinerant instruction) to be provided in conjunction with regular class placement." 34 C.F.R. §300.551. By defining the types of placement to be provided as synonymous with these examples in the continuum of placements, it is made clear that placement is the type of educational program and not a particular school. The Fourth Circuit throughout its decision erroneously viewed placement as being specific schools rather than the program of services defined in the IEP. Decisions in other circuits address placement under EHA in terms of the level of services and not to the actual school selected. See e.g., Lachman, et al. v. Illinois State Board of Educa-

tion, et al., 853 F.2d 290 (7th Cir. 1988) (wherein placements were discussed in terms of level of services - regular education versus self-contained); Digre v. Roseville Schools Independent District No. 623, 841 F.2d 245 (8th Cir. 1988) (current educational placement was in a special education program and not in regular education); and S-1 v. Turlington, 635 f.2d 342 (5th Cir. 1981) (termination of special education services is a change in placement).

Abandoning the Fourth Circuit's approach to placement, it is obvious that placement must be considered in advance of writing the IEP. IEP is a defined term. 20 U.S.C. §1401(19). A statement of the specific educational

services to be provided to the handicapped child is required to be included in the IEP. Id. This factor can only be appropriately addressed in the IEP by determining the level of services in advance of drafting the IEP. Thus, placement is appropriately handled in advance of, or in conjunction with, the development of the IEP. It cannot be appropriately specified after IEP development.

III.

DELAYING A DETERMINATION OF PLACEMENT UNTIL AFTER THE IEP MEETING WILL HAMPER EFFORTS TO PROVIDE A FREE APPROPRIATE PUBLIC EDUCATION TO HANDICAPPED STUDENTS.

Placement is an issue of extreme importance to parents throughout the IEP

process. This fact is evident in that in most cases, the parents' initial request for special education services also encompasses a request for particular special education services. In other cases, the parents frequently ask about placement options and are referred by special education personnel to observe specific programs which may be appropriate while the evaluation and IEP processes are ongoing. A placement (meaning program) is then selected and given effect in the IEP. School divisions will now be reluctant to engage in such an exchange for fear the actions will be viewed as a predetermination of placement.

Parents are intimately involved in

placement determinations during the IEP process because they can then indicate their desires for the level of services they believe to be appropriate. The IEP will be developed to reflect the joint desires of the parties. Where the parents and school system disagree, the school decision will have an obligation to advise the parents of their right to appeal through a due process hearing conducted pursuant to 20 U.S.C. § 1415(e)(2). In order to follow the decision of the Fourth Circuit, school boards will need to refuse to discuss placement with the parents prior to completion of the IEP. This refusal will be required even when the parents are requesting such discussions in order

to avoid any appearance of predetermination of placement by the school division. This approach can only cause parents to be resentful of school divisions and will be viewed as delaying tactics. In fact, implementation of the IEP will be delayed if placement can only be explored and determined after IEP development. The handicapped student for whom it has been determined the special services are required will be the one to suffer from any delays.

CONCLUSION

For these reasons, it is requested that a Writ of Certiorari be issued to reverse the Fourth Circuit's decision

on the procedural violations.

Respectfully submitted,

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No. 88-1022

In The Supreme Court Of The United States

OCTOBER TERM, 1988

HENRICO COUNTY PUBLIC SCHOOLS, MALCOLM M. CHRISTIAN, WILLIAM C. BOSHER, JR., MORTON BRADMAN, JOANN MARCHANT, PATRICIA MARTIN, GWENDOLYN WHITING, DOROTHY SUGARMAN, and DONALD MAYFIELD,

Defendants/Petitioners,

v.

JONATHAN SPIELBERG, a minor by his parents, Howard and Susan Spielberg, as his next friend; HOWARD SPIELBERG; and SUSAN SPIELBERG,

Plaintiffs/Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SECOND SUPPLEMENTAL BRIEF CALLING ATTENTION TO INTERVENING MATTER

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No. 88-1022

In The
Supreme Court Of The United States

October Term, 1988

HENRICO COUNTY PUBLIC SCHOOLS, MALCOLM M. CHRISTIAN, WILLIAM C. BOSHER, JR., MORTON BRADMAN, JOANN MARCHANT, PATRICIA MARTIN, GWENDOLYN WHITING, DOROTHY SUGARMAN, and DONALD MAYFIELD,

Defendants/Petitioners,

v.

JONATHAN SPIELBERG, a minor by his parents, Howard and Susan Spielberg, as his next friend; HOWARD SPIELBERG, and SUSAN SPIELBERG,

Plaintiffs/Respondents.

Second Supplemental Brief Calling Attention To Intervening Matter

REGULATORY PROVISIONS INVOLVED

Title 34 of the Code of Federal Regulations provides, in relevant part, as follows:

§ 300.342(b) An individualized education program must:

(1) Be in effect before special education and related services are provided to a child; and
(2) Be implemented as soon as possible following the meetings under Reg. 300.343.
Comment - Under paragraph (b)(2), it is expected that a handicapped child's individualized education program (IEP) will be implemented immediately following the meetings under Reg. 300.343.

§ 300.347(a)(1) Before a public agency places a handicapped child in, or refers a child to, a private school or facility, the agency shall initiate and conduct a meeting to develop an individualized education program for the child in accordance with Reg. 300.343.

(2) The agency shall insure that a representative of the private school facility attends the meeting. If the representative cannot attend, the agency shall use other methods to insure participation by the private school or facility, including individual or conference telephone calls.

§ 300.504(a) Written notice which meets the requirements under Reg. 300.505 must be given to the parents of a handicapped child a reasonable time before the public agency:

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free

appropriate public education to the child, or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child.

§ 300.505(a) The notice under Reg. 300.504 must include:

(1) A full explanation of all of the procedural safeguards available to the parents under Subpart E;

(2) A description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take the action, and a description of any options the agency considered and the reasons why those options were rejected;

(3) A description of each evaluation procedure, test, record, or report the agency uses as a basis for the proposal or refusal; and

(4) A description of any other factors which are relevant to the agency's proposal or refusal.

§ 300.533(a) In interpreting evaluation data and in making placement decisions, each public agency shall:

(1) Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior;

(2) Insure that information obtained from all of these sources is documented and carefully considered;
(3) Insure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and
(4) Insure that the placement decision is made in conformity with the least restrictive environment rules in Regs. 300.550-300.554.

(b) If a determination is made that a child is handicapped and needs special education and related services, an individualized education program must be developed for the child in accordance with Regs. 300.340-300.349 of Subpart C.

§ 300.552 Each public agency shall insure that:

(a) Each handicapped child's educational placement:
(1) Is determined at least annually,
(2) Is based on his or her individualized education program, and
(3) Is as close as possible to the child's home....

Appendix C to 34 C.F.R. Part 300 provides, in relevant part, as follows:

3. In requiring that an IEP be in effect before special education

and related services are provided, what does "be in effect" mean?

As used in the regulations, the term "be in effect" means that the IEP (1) has been developed properly (i.e., at a meeting(s) involving all of the participants specified in the Act (parent, teacher, agency representative, and, where appropriate, the child)); (2) is regarded by both the parents and agency as appropriate in terms of the child's needs, specified goals and objectives, and the services to be provided; and (3) will be implemented as written.

5. **For a handicapped child receiving special education for the first time, when must an IEP be developed - before placement or after placement?**

An IEP must "be in effect <u>before</u> special education and related services are provided to a child." (§300.342(b)(1), emphasis added.) The appropriate placement for a given handicapped child cannot be determined until after decisions have been made about what the child's needs are and what will be provided. Since these decisions are made at the IEP meeting, it would not be permissible to first place the child and then develop the IEP. Therefore, the IEP must be developed before placement.

42. **When must IEP objectives be written - before placement or after placement?**

IEP objectives must be written before placement. Once a handicapped child is placed in a special education program, the teacher might develop lesson plans or more detailed objectives based on the IEP; however, such plans and objectives are not required to be a part of the IEP itself.

55. **Is it permissible for an agency to have the IEP completed when the IEP meeting begins?**

No. It is not permissible for an agency to present a completed IEP to parents for their approval before there has been a full discussion with the parents of (1) the child's need for special education and related services, and (2) what services the agency will provide to the child. Section 602(9) of the Act defines the IEP as a written statement developed in any meeting with the agency representative, the teacher, the parent, and, whenever appropriate, the child.

It would be appropriate for agency staff to come prepared with evaluation findings, statements of present levels of educational performance, and a recommendation regarding annual goals, short term instructional objectives, and the kind of

special education and related services to be provided. However, the agency must make it clear to the parents at the outset of the meeting that the services proposed by the agency are only recommendations for review and discussion with the parents. The legislative history of Pub. L. 94-142 makes it clear the parents must be given the opportunity to be active participants in all major decisions affecting the education of their handicapped children. (See, e.g., S. Rep. No. 168, 94th Cong. 1st Sess. 13 (1975); S. Rep. No. 455 (Conference Report), 94th Cong. 1st Sess. 47-50 (1975).)

59. **If placement decisions are made at the time the IEP is developed, how can a private school representative attend the meeting?**

Generally, a child who requires placement in either a public or private residential school has already been receiving special education, and the parents and school personnel have often jointly been involved over a prolonged period of time in attempting to find the most appropriate placement for the child. At some point in this process (e.g., at a meeting where the child's current IEP is being reviewed), the possibility of residential school placement might be proposed - by either the

> parents or school personnel. If both agree, then the matter would be explored with the residential school. A subsequent meeting would then be conducted to finalize the IEP. At this meeting, the public agency must ensure that a representative of the residential school either (1) attends the meeting, or (2) participates through individual or conference telephone calls, or by other means.

STATEMENT OF THE CASE

On December 16, 1988, Henrico officials filed their Petition for Writ of Certiorari and accompanying Appendix with the Clerk of this Court. On January 10, 1989, Henrico officials filed a Supplemental Brief to call the Court's attention to a relevant December 5, 1988 interpretation of the Virginia State Department of Education received too late to include in the Petition. On January 26, 1989, the United States Department of Education (the "Department") issued a specific interpretation of some of the

regulations at issue in this case in a letter to the Honorable Thomas J. Bliley, Jr., Third District Congressman from Virginia. This letter is reproduced in the Appendix at pages App. II,1-9.[1]

Because the letter states the Department's contrary view of two regulatory interpretations employed by the Fourth Circuit Court of Appeals, this Second Supplemental Brief respectfully directs the Court's attention to pertinent portions of the Department's letter. This Second Supplemental Brief is authorized by Rule 22.6 of the Rules of the Supreme Court of the United States of America.

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[1] Because the Appendix to the Pettition used arabic page numbers and the Appendix to the first Supplemental Brief used Roman numerals for its page numbering, the Appendix to this Second Supplemental Brief numbers the pages as follows: App. II,#.

ADDITIONAL REASONS FOR GRANTING THE WRIT

I. The United States Department Of Education Has Issued A New Regulatory Interpretation Contrary To The Fourth Circuit's Decision.

A. The United States Department Of Education Has Ruled That There Is No Private School "Exception" To 34 C.F.R. §300.552 Despite The Fourth Circuit's Ruling To The Contrary.

To reach its finding of a procedural violation by Henrico school officials, the Fourth Circuit created a private school "exception" to the "general rule" that "placement should be based on the IEP." App. 14, 11-12 (citations omitted). The private school "exception" was necessitated by the panel's inability to otherwise reconcile its erroneous reading of 34 C.F.R. §300.552 with the requirement of private school participation in IEP development found in 34 C.F.R. §300.347(b).

The panel took the illogical view that under 34 C.F.R. §300.552(a) "the placement decision can precede IEP development" in a case where the child will be educated in a private school but not when "the child will be educated in public facilities." App. 13 (citations omitted). Therefore, it said, "[s]ince Randolph is a public school, the general rule, not the exception, applies, and placement should have followed IEP development." App. 14.

In direct contrast, Question 4 of the Department's January 29, 1989 interpretation[2] flatly states that "there

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2 The Department's interpretation does not vitiate or alter Henrico's attacks on the Fourth Circuit's "zero tolerance" and "mental processes" tests. Instead, it establishes an additional ground for reversal because it shows that the Fourth Circuit's opinion was based on still other erroneous views of the law.

is no private school exception to the least restrictive environment or IEP requirements." App. II,6-7. Since the private school "exception" was a necessary element in the Fourth Circuit's opinion, the opinion should be reversed because of the Fourth Circuit's misunderstanding of the EAHCA regulatory scheme.

B. The United States Department Of Education Has Ruled That The Education Of All Handicapped Children Act (EAHCA) Does Not Contain A "Subjective Intent" Component And That School Officials May Consider Placement Changes Prior To Revision Of A Handicapped Child's IEP.

Also important to the Fourth Circuit's decision was the district court's finding that "the defendants resolved to place Jonathan in a daily program prior to the development of his annual IEP." App. 11, 14, 53 (emphasis added). Henrico has consistently

contended that this finding was based upon an erroneous view of the Act.[3]

Since there was no testimony, "resolution" or document stating that Henrico had made a placement decision before the IEP meeting, the district court's finding amounted to the application of a "mental processes" or "subjective intent" test by the district court.

Under this test, the district court purported to read the minds of school officials prior to their IEP meetings with the Spielbergs to determine that

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[3] Despite the School Board's allocation of 30% of its Fourth Circuit reply brief to contest this finding of the district court as "clearly erroneous," the Fourth Circuit did not conduct any analysis of the district court's basis for its finding. Instead, the panel took the district court's finding as a "given" without the appellate review contemplated by F.R.C.P. Rule 52(a).

they had "resolved" to make a placement change regardless of what happened in those meetings. To make its finding, the district court had to improperly ignore repeated written assurances to the Spielbergs that school officials would not make their placement decision until the IEP had been drafted as well as their testimony expressly denying that a placement decision had been made before the IEP meeting.[4] Joint Exhibit 127; Due process hearing testimony at 247, 144.

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[4] For this reason, Question 5 of the Department's interpretation does not apply to the facts of this case. App. II, 7-8. Henrico's September 13, 1985 notice of its proposal to change Jonathan's placement did not take the position that the placement proposed on September 13, 1985 would automatically be implemented following pro forma revision of Jonathan's IEP. Joint Exhibit 127. Instead, it invited the Spielbergs to provide outside evaluations at Henrico's expense, promised that any information (cont'd.)

Furthermore, not only was the district court's finding simply wrong on the facts, it was erroneous as a matter of law. While somewhat indirect, the Department's interpretation indicates there is no "subjective intent" test under EAHCA.

When asked in Question 3 if the Act contains a "subjective intent" component, the Department's response refers the reader to the responses to Questions 1

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[4] (cont'd.) submitted would be considered by the eligibility and IEP committees, and expressly stated that "the placement decision will not be made until an IEP has been developed on October 15, 1985." The notice also stated that a placement other than that proposed "may ultimately be chosen." Joint Exhibit 127.

Under these circumstances, the notice did not violate the Act. See Jackson v. Franklin County School Board, 806 F.2d 623, 628-29 (5th Cir. 1986) (school officials violated EAHCA because they did not send a prior written notice proposing a change in placement and then convene an IEP meeting to discuss a placement change).

and 2. App. II,5-6. Question 2 asked whether 34 C.F.R. §300.552(a)(2) prohibits "local education agency consideration of a change in educational placement prior to revision of a handicapped child's IEP." App. II,3. Interestingly, the response to Question 6 provides the direct answer: "The answer to question 2 was no." App. II,9. The response to Question 2 amplified this answer by affirming that the "possible need for a change in placement could be considered prior to revision of the IEP." App. II,3.

Therefore, the Department's position is that school officials may consider placement changes prior to IEP meetings and that the process of considering alternatives does not violate the Act. The district court's resort to what it felt school officials "resolved" shows

that it confused permissible consideration of educational alternatives with supposedly impermissible decision-making. Thus, the finding of the district court, and by extension that of the Fourth Circuit, was based upon a misunderstanding of the regulations and should be reversed.

HENRICO COUNTY PUBLIC SCHOOLS
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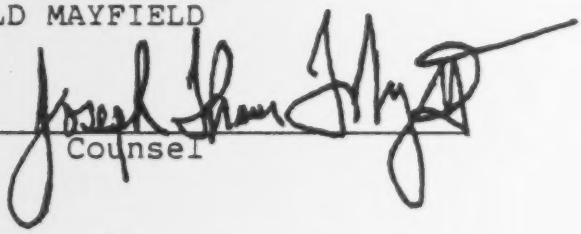
By 
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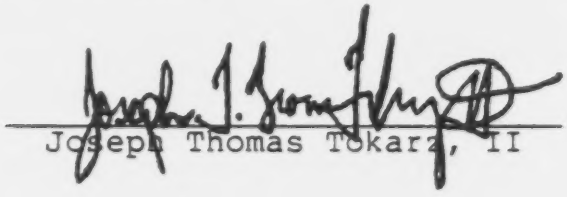
CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of February, 1989, a true and accurate copy of the foregoing Second Supplemental Brief Calling Attention To Intervening Matter has been hand-delivered to the offices of: Thomas Franklin Guernsey, Esq., Associate Professor of Law, Youth Advocacy Clinic, University of Richmond, Richmond, Virginia 23173 and Kathleen S. Mehfoud, Esq., 411 E. Franklin Street, Suite 602, Richmond, Virginia 23219.



Joseph Thomas Tokarz, II

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE ASSISTANT SECRETARY
FOR SPECIAL EDUCATION AND
REHABILITATIVE SERVICES

January 26, 1989

Honorable Thomas J. Bliley, Jr.
House of Representatives
213 Cannon Office Building
Washington, D.C. 20515

Dear Congressman Bliley:

Thank you for your letter to Dr. G. Thomas Bellamy concerning the application of certain regulations for Part B of the Education of the Handicapped Act (EHA-B). You posed a number of specific questions concerning the rules under 34 CFR §§300.504(a)(1), 300.552(a)(2) and 300.347. Your questions and our responses follow.

Question (1): Does 34 CFR §300.552(a)(2) require that no

decisions be made about placement before an IEP is prepared or revised, or does it merely require that the subsequent actual delivery of special education and related services be based upon the requirements of the IEP?

Response: Both are true. Note that §300.342(b)(1) requires that an IEP must be in effect before special education and related services can be provided. In addition, all placement decisions must be made on an individual basis and only after a valid IEP has been completed for each child.

Question (2): If the answer to question (1) is that 34 CFR §300.552(a)(2) prohibits decisions about placement before an IEP is prepared or revised, does 34 CFR §300.552(a)(2) prohibit local education agency consideration of a change of educational placement prior to revision of a handicapped child's IEP?

Response: The possible need for a change in placement could be considered prior to revision of the IEP, while the specific placement decision is determined after the IEP is reviewed and, if appropriate, revised. Under EHA-B regulations, IEP goals and

objectives must be written before a placement. 34 CFR Part 300, Appendix C, Question 42. See also Appendix C, Questions 3 and 5 and the recently-decided case of Spielberg v. Henrico County Public Schools, 853 F 2d 256 (4th Cir. 1988), EHLR DEC. 441:178; Note also that Appendix C specifically states that "[i]t is not permissible for an agency to present a completed IEP to parents for their approval before there has been a full discussion with the parents .... It would be appropriate for agency staff to come prepared with evaluation findings, statements of present levels

of education, and a recommendation regarding annual goals, short-term instructional objectives, and the kind of special education and related services to be provided. However, the agency must make it clear to the parents at the outset of the meeting that the services proposed by the agency are only recommendations for review and discussion with the parents."

34 CFR Part 300, Appendix C, Question 55.

Question (3): Does the EAHCA contain a "subjective intent" component: i.e., are the parents' procedural rights

violated if school officials have strong opinions about an appropriate placement but agree to defer a placement decision until after revision of a handicapped child's IEP?

Response: The responses to questions 1 and 2 apply.

Question (4): Is there a "private school" exception to 34 CFR §300.552(a) so that the answers to the preceding questions would be different if a private school is the current placement or if it is a potential placement?

Response: No. There is no private school exception to

the least restrictive environment or IEP requirements. Private school representatives may attend an IEP meeting when private school placement is merely under consideration. See 34 CFR Part 300, Appendix C, Question 59, which provides guidance for compliance with the requirements of 34 CFR §300.347.

Question (5): May school officials legally send a written notice complying with the requirements of 34 CFR §300.505, if the notice proposes a change in placement before development of a revised IEP, and if the notice

specifically states the actual placement decision will be made following revision of the IEP?

Response: If you are asking if a notice proposing a change in placement can be issued before the revision of the IEP, with the actual implementation of that proposed change in placement coming after that review, the answer is, "No." See 34 CFR §§300.533(b), 300.552(a)(2) and 300.342(b)(1) and Appendix C, 34 CFR Part 300, Question 55.

Question (6): If the answer to question (2) is yes, how

can school officials invite representatives of a private school to attend an IEP meeting as required by 34 CFR §300.347 without violating 34 CFR §300.552(a)(2)?

Response: The answer to question (2) was no. Therefore, there is no conflict between these two sections. In addition, you should note the response to question 4 and the discussion in 34 CFR Part 300, Appendix C at Question 59 which explores this subject.

We appreciate your interest and we hope you find our responses helpful. Let me

know if we can be of any further assistance.

Sincerely,

[signed]

Madeleine Will
Assistant Secretary